No. 91-8199-CFY
Status: GRANTED

Title: Thomas Lee Deal, Petitioner
v.
United States

Docketed:
May 7, 1992

Court: United States Court of Appeals for the Fifth Circuit

See also:
91-8180

Counsel for petitioner: Dahlin,Roland

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 7 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jun 12 1992		Order extending time to file response to petition until July 17, 1992.
5	Jun 17 1992		Brief of respondent United States filed.
6	Jun 25 1992		DISTRIBUTED. September 28, 1992
8	Oct 5 1992		Petition GRANTED.
			**********
10	Nov 2 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
9	Nov 3 1992		Joint appendix filed.
11	Nov 19 1992		Brief of petitioner Thomas Lee Deal filed.
12	Nov 24 1992		Record filed.
		*	Original proceedings United States District Court, Southern District of Texas (Box) (Sealed Documents)
13	Dec 21 1992		Brief of respondent United States filed.
14	Dec 28 1992		SET FOR ARGUMENT MONDAY, MARCH 1, 1993. (2ND CASE).
15	Jan 4 1993		CIRCULATED.
16	Jan 22 1993	X	Reply brief of petitioner filed.
18	Mar 1 1993		ARGUED.

NO. 91-8199

(2)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
5-7- 1992
OFFICE OF THE CLERK

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Attorney of Record

DOLA J. YOUNG
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Houston, Texas 77208-1508
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25pp

NO. _____

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THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

91-8199

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, THOMAS LEE DEAL, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), in the United States District Court for the Southern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
May 7, 1992

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Attorney of Record

Supreme Court, U.S.
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MAY 7 1992
OFFICE OF THE CLERK

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9

QUESTION PRESENTED

Whether the petitioner's fifth amendment due process rights were violated by not applying the rule of lenity to the "second or subsequent" language in 18 U.S.C. § 924(c)(1).

LIST OF PARTIES BELOW

1. United States of America.
2. Thomas Lee Deal.

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Whether the petitioner's fifth amendment due process rights were violated by not applying the rule of lenity to the "second or subsequent" language in 18 U.S.C. § 924(c).

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PRAYER

The petitioner, THOMAS LEE DEAL, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued February 7, 1992.

OPINIONS BELOW

On February 7, 1992, the United States Court of Appeals for the Fifth Circuit, in a published opinion, affirmed the judgment of conviction in this case. United States v. Deal, 954 F.2d 262 (5th Cir. 1992). A copy of this opinion is attached as Appendix A.

A copy of the judgment and sentence of the district court is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

On February 7, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In pertinent part, the fifth amendment of the United States Constitution provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law;...

Section 924(c) of Title 18, United States Code provides in pertinent part:

> (1) Whoever, during and in relation to any crime of violence ... uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence ... be sentenced to imprisonment for five years,... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years,...
>
> Notwithstanding any other provision of law,.. the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence... in which the firearm was used or carried.

STATEMENT OF THE CASE

Course of Proceedings

The petitioner, THOMAS LEE DEAL, was charged in a thirteen-count superseding indictment with six different bank robberies, in violation of 18 U.S.C. § 2113(a) and (d); with six different uses of a deadly weapon during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(g). The Federal Public Defender was appointed to represent Mr. Deal at trial.

A jury trial was held and the jury convicted Mr. Deal on all counts. The court sentenced Mr. Deal to serve 168 months for the bank robberies and for being a felon in possession of a firearm, followed by 105 years for the violations of 18 U.S.C. § 924(c). A breakdown of the 105 years shows that he was sentenced to five years on the first count, to be served consecutive to the sentence for the bank robberies and being a felon in possession of a firearm; and 20 years on each of the remaining five counts, to be served consecutive to each other and to the sentences in all other counts. Mr. Deal timely appealed to the Fifth Circuit Court of Appeals. On February 7, 1992, that court entered its opinion affirming petitioner's convictions.

STATEMENT OF FACTS

Mr. Deal was indicted for the robbery of Ameriway Bank, Houston, Texas, on January 24, 1990; Ameriway Bank, Houston, Texas, on February 23, 1990; Charter Bank (Fountainview), Houston, Texas, on March 1, 1990; Charter Bank (Westheimer), Houston, Texas, on March 5, 1990; First Texas Bank, Houston, Texas, on March 13, 1990; and Charter Bank (Fountainview), Houston, Texas, on April 12, 1990. He was also indicted for using or carrying a firearm in relation to each of these robberies. These twelve violations were charged in one indictment.

The described facts are the only facts pertinent to this petition.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging violations of Section 924(c)(1), Title 18, United States Code.

REASONS FOR GRANTING THE WRIT

The petitioner's fifth amendment due process rights were violated by not applying the rule of lenity to the "second or subsequent" language in 18 U.S.C. § 924(c)(1).

The "second or subsequent" language renders the statute ambiguous, because those words carry two different interpretations and a totally absurd penalty results when the opinion rendered by the Fifth Circuit Court of Appeals is applied to Mr. Deal's situation. Before the instant indictment, Mr. Deal had never been convicted of a section 924(c) offense. As shown from the discussion herein, Congress did not envision that a defendant would face such a Draconian penalty the first time he is convicted of violations under this statute.

Before applying the rule of lenity, the wording of a statute must clearly indicate the use of one meaning; if that is impossible, then the indication must be gotten from the legislative history. See Chapman v. United States, 111 S.Ct. 1919, 1926 (1991)(citations omitted). If these examinations fail to point to which meaning was intended, then the rule of lenity is applied and

the ambiguous statute must be construed in favor of the defendant by adopting the less harsh meaning. See Ladner v. United States, 358 U.S. 169, 177 (1958).

A. Statutory Ambiguity Exists in Unclear Language.

When examining a statute, it is always considered that Congress uses words as they are commonly and ordinarily understood. Perrin v. United States, 444 U.S. 37, 42 (1979); United States v. Yeatts, 639 F.2d 1186, 1189 (5th Cir. Unit B), cert. denied, 452 U.S. 964 (1981). The plain language of the statute controls absent a clearly expressed legislative intent to the contrary. United States v. Raymer, 876 F.2d 383, 389 (5th Cir.), cert. denied 110 S. Ct. 198 (1989). Any interpretation that renders parts or words in a statute inoperative or superfluous is to be avoided. Weinberger v. Hynson, 412 U.S. 609, 633 (1973). Before concluding that a statute is truly ambiguous, all sources of legislative intent must be reviewed. United States v. Davis, 656 F.2d 153, 158 (5th Cir. Unit B), cert. denied 456 U.S. 930 (1982).

In pertinent part, 18 U.S.C. § 924(c) provides as follows:

> (1) Whoever, during and in relation to any crime of violence...uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence...be sentenced to imprisonment for five years,... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years,...
>
> Notwithstanding any other provision of law,.. the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence ... in which the firearm was used or carried.
> (emphasis added)

The underlined language is facially ambiguous. Because "subsequent" may be subsumed within the meaning of "second," as a second conviction must always be subsequent to the first, these two words provide no meaningful description to how the statute is intended to function. If not subsumed, then those words are rendered meaningless, because the meaning attached to "conviction" is unclear.

B. Split in Circuits: Reading the Legislative History

Section 924(c) was enacted as part of the Gun Control Act of 1968 and was offered as an amendment on the floor of the House of Representatives. See Simpson v. United States, 435 U.S. 6, 13 (1978). The only legislative history is contained in Congressional debates over the amendment. See 114 Cong. Rec. 22229-48 (1968). The Eleventh Circuit Court of Appeals, which provided the seminal case on section 924(c), found the "second or subsequent conviction" language conclusive and that the intent of Congress supported the conclusion that the enhancement provision had been legitimately triggered. United States v. Rawlings, 821 F.2d 1543, 1546 (11th Cir.), cert. denied 484 U.S. 979 (1987). The interpretation urged in that opinion, and followed by five other circuit courts, does not carry out the intent of Congress.

In its opinion, the Fifth Circuit did not consider the legislative history, because it concluded that the statutory language is not ambiguous. See United States v. Deal, 954 F.2d 262 (5th Cir. 1992). That court accepted the reasoning in Rawlings and its progeny. Id. at 263. It apparently also accepted the

government's supposition that Congress used that language to prevent prosecutors from manipulating the manner of charging offenses. See Id. Nothing in the legislative history supports the government's supposition. See 114 Cong. Rec. 22229-48 (1968). The Rawlings opinion correctly quotes from the comments of the sponsors of the bill regarding the sentencing provisions of section 924(c). These quotations, however, do not consider the totality of the Congressional discussions. In an opinion that creates a split in the circuits, the Tenth Circuit Court of Appeals has thoroughly examined the legislative history and concluded that the enhancement provision is not triggered in a factual situation exactly the same as Mr. Deal's. See United States v. Abreu, 1992 U.S. App. LEXIS 6654 (10th Cir.).

The focus of the Congressional debate was on enacting legislation that would "provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission." 114 Cong. Rec. 22234. "[T]hey [criminals] seldom get in there long enough for the psychologist and the penologist to shake hands with them before they are out again." Id. at 22230. Throughout the discussion, the members emphasized that the sentences be mandatory and that they not be suspended. See id. The enhanced penalty was provided so that repeat offenders would receive stronger punishment than they did the first time they served a sentence of imprisonment. Greater punishment because of the nature of the crime and the recidivist nature of the offender is an accepted principle. United States v. Hayden, 898 F.2d 966, 967 (5th Cir. 1990)(citing Solem v. Helm, 463

U.S. 277 (1983)). Although it appears that Congress was concerned with recidivism, no discussion occurred on the use of "second or subsequent convictions." We are therefore left with no indication of how the statute is to be applied when faced with the issue herein: whether the sentence enhancement provision is triggered when the offenses are charged in a single indictment. When the enhancement is applied under these circumstances, the result is Draconian. Imposing the penalty on offenses charged in the same indictment causes a defendant to be punished as a recidivist before he has been released from his first imprisonment. Congress definitely intended to focus on recidivists and there is no evidence that Congress intended that a defendant be treated as a recidivist in the first adjudication.

C. Rule of Lenity Must be Applied in this Case.

Mr. Deal was sentenced to five years imprisonment for the first offense in the indictment under 18 U.S.C. § 924(c)(1) and twenty years imprisonment for each of the remaining five counts under that statute, for a total sentence of 105 years. The statute is ambiguous, and the rule of lenity must be applied to avoid an absurd or glaringly unjust sentence. See Chapman, 111 S.Ct. at 1926.

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." Ladner, 358 U.S. at 178. The courts may not create ambiguity where Congress has clearly manifested its intention. Bifulco v. United States, 447 U.S. 381, 387 (1980).

Applying the policy of lenity requires that the court adopt the less harsh meaning when neither the wording of the statute nor its legislative history points clearly to either meaning. Ladner, 358 U.S. at 177. The Fifth Circuit Court of Appeals has itself long recognized that a federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress intended to criminalize. Yeatts, 639 F.2d at 1189. Furthermore, this Court has held that a statute will not be interpreted as increasing the penalty an individual faces when the interpretation is based on a guess as to what Congress intended. Simpson 435 U.S. at 15 (1978) (quoting Ladner, 358 U.S. at 178)). Any punishment authorized by statute is permissible "so long as that penalty is not cruel and unusual ... and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." Chapman, 114 L.Ed.2d at 538 (citations omitted).

A term of imprisonment of 105 years is harsh punishment for one who has never been a recidivist. Mr. Deal was punished for both his first and second offenses at the same time, which defeats the purpose of providing a stronger penalty for repeat offenders than the first time they served a sentence of imprisonment for violations of 18 U.S.C. § 924(c). Mr. Deal's punishment was cruel and unusual in light of the fact that he received a sentence of only 13 years for the underlying bank robberies. The sentence of 105 years is also arbitrary because the Fifth Circuit's interpretation of "second or subsequent conviction" sometimes results in cruel and unusual punishment.

The legislative history reveals nothing on the intentions of Congress in using this language. As this Court has stated, a straightforward reading of a statute must not "produce a result 'so absurd or glaringly unjust' ... as to raise a 'reasonable doubt' about Congress's intent." Chapman, 111 S.Ct. at 1926-27.

The mere fact that both the petitioner and the government could discern two different reasons for using this language emphasizes the inherent ambiguity. Narrowly construing section 924(c) and applying the policy of lenity requires that mandatory, concurrent five year sentences be imposed for offenses charged in a single indictment when no punishment has been previously served.

CONCLUSION

For these reasons, the petitioner respectfully prays that his application for a writ of certiorari be granted by this Court.

Date:
May 7, 1992

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas

Roland E. Dahlin II

By_____
DOLA J. YOUNG
Assistant Federal Public Defender
Attorneys for Petitioner
Post Office Box 61508
Houston, TX 77208-1508
Telephone: COML/FTS: 713 238-9600

Conclusion

Because we conclude that we lack jurisdiction to review the district court's order and that a writ of mandamus is not an appropriate remedy here, the appeal is dismissed and the application for a writ of mandamus is denied.

Appeal DISMISSED; Mandamus DENIED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas Lee DEAL, Defendant-Appellant.

No. 91-2407.

United States Court of Appeals, Fifth Circuit.

Feb. 7, 1992.

Defendant was convicted in the United States District Court for the Southern District of Texas, Norman W. Black, J., of various counts of bank robbery involving use of deadly weapon and one count of being felon in possession of firearm, and he appealed from sentencing. The Court of Appeals, DeMoss, Circuit Judge, held that "second or subsequent conviction" within meaning of statute providing enhanced penalties for use of deadly weapon during crime of violence can result from same indictment as first conviction under that statute.

Affirmed.

Criminal Law ⇐1202.9

Defendant's second conviction under statute providing additional penalty for use of gun during crime of violence triggered enhancement for "second or subsequent conviction" even though the second or subsequent conviction resulted from a separate count, involved in indictment leading to first conviction. 18 U.S.C.A. § 924(c).

Roland E. Dahlin, Federal Public Defender, Dola Young, Asst. Federal Public Defender, Houston, Tex., for defendant-appellant.

Paula C. Offenhauser, D.R. Millard, III, Asst. U.S. Attys., Ronald G. Woods, U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Thomas Lee Deal ("Deal") went on a crime spree in the Houston, Texas area, committing six armed robberies of various banks during the period of January through April 1990. In each robbery he used a gun. When caught, he was indicted in a 13 count superseding indictment with six counts of bank robbery involving offenses under 18 U.S.C. § 2113(a) and (d); six counts involving use of a deadly weapon during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The jury found Deal guilty on all counts. The probation office considered the six counts of 18 U.S.C. § 924(c) as six separate convictions and applied the statutory enhancement which raises the penalty from five years to twenty years per count for each of the "second or subsequent" convictions. This resulted in a sentence recommendation of 105 years on the § 924(c) counts and as Congress mandated, these sentences were to run consecutively. Deal made the proper objections to the trial court, but the district judge sentenced in accordance with the probation officer's recommendations.

Deal appealed on the single grounds of whether or not the District Court imposed the proper sentence in connection with the counts of conviction under 18 U.S.C.

§ 924(c). The issue raised by Deal is a question of law; and the standard of review is therefore *de novo*. *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir.1990). This is the first occasion on which this Court has had to address this question.

The pertinent part of 18 U.S.C. § 924(c) provides:

> Whoever, during and in relation to any crime of violence ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence ..., be sentenced to imprisonment for five years,.... *In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years,....*
>
> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence ... in which the firearm was used or carried. (emphasis added)

Deal urges that Congress' use of the disjunctive "second or subsequent" to modify "conviction" in § 924(c) creates an ambiguity because the meaning of "second" is subsumed into the meaning of "subsequent." Deal argues that under the plain meaning of "subsequent", the provision should be interpreted to require that an offender be convicted under *separate* indictments before the enhancement provision could apply. Since he was convicted for several offenses charged in the same indictment, Deal argues that he was not subject to a "subsequent conviction"; and, therefore, he should not have received an enhanced sentence.

The government contends that Congress included, "second or subsequent conviction" to cover both the situation where a defendant is convicted of more than one § 924(c) offense in one indictment and the situation where the separate offenses are charged in separate indictments. The government argues that Congress wisely put this language in to preclude prosecutors from having discretion to control the imposition of the enhancement by the manner of charging the offenses.

If this were a matter of first impression before any Circuit Court, we might be inclined to explore the controversy further. However, the Eleventh, Eighth, Sixth, Seventh and Fourth Circuits have previously determined that a "second or subsequent conviction" under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c). *See, United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987); *United States v. Hamblin*, 911 F.2d 551, 555 (11th Cir.1990), *cert. denied sub. nom., Jones v. United States*, — U.S. —, 111 S.Ct. 2241, 114 L.Ed.2d 482 (1991); *United States v. Foote*, 898 F.2d 659, 668–69 (8th Cir.), *cert. denied sub. nom., Thompson v. United States*, — U.S. —, 111 S.Ct. 112, 112 L.Ed.2d 81 and *Williams v. United States*, — U.S. —, 111 S.Ct. 342, 112 L.Ed.2d 307 (1990); *United States v. Nabors*, 901 F.2d 1351, 1358–59 (6th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990); *United States v. Bennett*, 908 F.2d 189, 194–95 (7th Cir.) *cert. denied*, — U.S. —, 111 S.Ct. 534, 112 L.Ed.2d 544 (1990); *United States v. Luskin*, 926 F.2d 372, 375 (4th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 68, 116 L.Ed.2d 43 (1991).

In the present case, each of counts 2, 4, 6, 8, 10, and 12, which were the counts alleging violations of § 924(c), related to bank robberies committed on different days involving different banks and different times. We hold, therefore, that the District Court correctly imposed the proper sentence in this case, including the enhancements resulting from "second or subsequent" convictions under 18 U.S.C. § 924(c).

For the foregoing reasons, the judgment is AFFIRMED.

ENTERED

United States District Court

APR 29 1991

SOUTHERN District of TEXAS

Jesse E. Clark, Clerk
By Deputy:

UNITED STATES OF AMERICA
V.

THOMAS LEE DEAL
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: H-90-00315-S-01

Dola Young
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____
☒ was found guilty on count(s) 1-13 on January 23, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)

See Page 1a

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of $ 650.00, for count(s) 1-13, which shall be due ☒ immediately ☐ as follows:

CLERK, UNITED STATES DISTRICT COURT, Attention: Finance, P. O. Box 61010, Houston, Texas 7720

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid, UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 458-70-6892

Defendant's Date of Birth: 09-23-46

Defendant's Mailing Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

Defendant's Residence Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

April 12, 1991
Date of Imposition of Sentence

Signature of Judicial Officer
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

4-26-91
Date

APPENDIX B

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:2113(a) & (d)	Robbing a bank by use of force at gunpoint	1-24-90 3- 1-90 3- 5-90 3-13-90 4-12-90	1, 5, 7, 9, 11
18:924(c)	Use and possession of a firearm during or in relation to a crime of violence	1-24-90 2-23-90 3 -1-90 3- 5-90 3-13-90 4-12-90	2, 4, 6, 8, 10, 12
18:2113(a)	Robbing a bank	2-23-90	3
18:922(g)	Unlawful receipt and possession of a firearm	4-12-90	13

Defendant: THOMAS LEE DEAL
Case Number: H-90-00315-S-01

IMPRISONMENT

The defenda t is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED SIXTY-EIGHT (168) MONTHS on Counts 1, 3, 5, 7, 9, & 11, each count to be served concurrent to each other;

ONE HUNDRED TWENTY (120) MONTHS on Count 13, to be served concurrent with Counts 1, 3, 5, 7, 9, & 11;

FIVE (5) YEARS on Count 2, to be served consecutive to Counts 1, 3, 5, 7, 9, 11, & 13;

TWENTY (20) YEARS on each of Counts 4, 6, 8, 10, and 12, to be served conseeutive to each other and to Counts 1, 2, 3, 5, 7, 9, 11, and 13.

☒ The court makes the following recommendations to the Bureau of Prisons: None.

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
- ☐ at _____ a.m. / p.m. on _____
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States marshal
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Case Number: H-90-00315-S

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on Counts 1, 5, 7, 9, and 11; THREE (3) YEARS on Counts 2, 3, 4, 6, 8, 10, 12, & 13.
(The term imposed on Counts 1-13 to run concurrent to each other)

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

APPROVED AS TO FORM: [signature]

★U.S.GPO:1990-722-449 10288

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

ROLAND E. DAHLIN II, a member of the Bar of this Court, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

The Honorable Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing the envelope in the Main Post Office, United States Postal Service, 401 Franklin Street, Houston, Texas 77201-9998, on May 7, 1992, and further certifies that all parties required to be served have been served.

Roland E. Dahlin II

ROLAND E. DAHLIN II

ORIGINAL

(3)

No. 91-8199

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS LEE DEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

9 pp

QUESTION PRESENTED

Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-8199

THOMAS LEE DEAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-14) is reported at 954 F.2d 262.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. The petition for a writ of certiorari was filed on May 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(c), six counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and six counts of using a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner was sentenced to a total of 168 months' imprisonment on the possession-of-a-firearm count and the bank robbery counts. He was sentenced to additional consecutive terms totaling 105 years' imprisonment on the use-of-a-firearm counts. Pet. App. 15-18. The court of appeals affirmed. Pet. App. 13-14.

1. The evidence at trial showed that petitioner, who had previously been convicted of bank robbery, robbed six banks in the Houston, Texas, area on six different days during a four-month period. The offenses occurred on January 24, February 23, March 1, March 5, March 13, and April 12, 1990. In each robbery, petitioner used a gun. Pet. App. 13, 16.

At sentencing, a dispute arose as to the penalty that should be imposed for petitioner's six firearms convictions under 18 U.S.C. 924(c). Section 924(c) provides in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years * * *.

Section 924(c) additionally specifies:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

Petitioner contended that he should be sentenced to six 5-year terms, while the government urged that petitioner was subject to one 5-year term, to be followed by five consecutive 20-year terms. The district court agreed with the government and, in accordance with the presentence report, sentenced petitioner to a total of 105 years' imprisonment on the six counts. The court of appeals affirmed, noting that "the Eleventh, Eighth, Sixth, Seventh, and Fourth Circuits have previously determined that a 'second or subsequent conviction' under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c)." Pet. App. 14.

ARGUMENT

1. When the court of appeals decided this case, every other court of appeals that had addressed the issue had concluded that a defendant who is convicted in a single proceeding of multiple violations of Section 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions. See United States v. Bernier, 954 F.2d 818 (2d Cir. 1992); United States v. Raynor, 939 F.2d 191, 193-194 (4th Cir. 1991); United States v. Bennett, 908 F.2d 189, 194-195 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); United States v. Nabors, 901 F.2d 1351, 1357-1359 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); United States v. Foote, 898 F.2d 659, 668-669 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987).

The Tenth Circuit, however, recently issued an en banc decision rejecting the reasoning of those courts of appeals. See United States v. Abreu, No. 89-4145 (10th Cir. Apr. 13, 1992). That court concluded that Section 924(c) does not provide unambiguous guidance for sentencing when a single prosecution produces multiple Section 924(c) convictions. Invoking the "rule of lenity," the Tenth Circuit held that Section 924(c)'s enhanced sentencing provisions apply only when the government has obtained a Section 924(c) conviction prior to the "second or subsequent" Section 924(c) offenses. Slip op. 16.

As we explain below, petitioner was properly sentenced in this case. Nevertheless, we do not oppose the issuance of a writ of certiorari to resolve the conflict that now exists among the courts of appeals. Section 924(c)'s prohibitions and penalties play an important role in federal law enforcement efforts, because persons who engage in drug trafficking and crimes of violence regularly carry and use firearms. The specific issue of multiple offense sentencing has great practical importance, because persons who engage in those activities often commit a series of criminal transactions before they are apprehended. Given Section 924(c)'s broad and frequent application, there is a need for a uniform sentencing rule when a single prosecution produces multiple Section 924(c) convictions.

2. Petitioner was properly sentenced under Section 924(c). Petitioner was convicted of six Section 924(c) offenses in a single proceeding. He was therefore properly sentenced to a 5-year term

of imprisonment on the first Section 924(c) conviction and an enhanced penalty on the five "second or subsequent" convictions. 18 U.S.C. 924(c). There is no need to resort to the "rule of lenity," because the statutory language in not ambiguous. Section 924(c) contains no prohibition on the application of an enhanced penalty when the first, second, and subsequent convictions are obtained through a single prosecution. See, e.g., United States v. Bennett, 908 F.2d at 194-195.

The Tenth Circuit's contrary construction -- which allows enhanced sentencing only when the government has obtained a Section 924(c) conviction prior to the "second or subsequent" Section 924(c) offenses -- finds no support in the language of Section 924(c). Indeed, that court's construction actually conflicts with the statutory language. Section 924(c) speaks only to the timing of the convictions -- not the timing of the offenses. If Congress had intended the Tenth Circuit's construction, it would not have employed language that is inconsistent with the Tenth Circuit's result. See United States v. Rawlings, 821 F.2d at 1546.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

JUNE 1992

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS LEE DEAL , PETITIONER	)	
V	)	NO. 91-8199
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by mail on June 17, 1992.

ROLAND E. DAHLIN II
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KENNETH W. STARR
Solicitor General

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No. 91-8199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS LEE DEAL,

Petitioner,

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 7, 1992
CERTIORARI GRANTED OCTOBER 5, 1992

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/17/90	Indictment in U.S. District Court for the Southern District of Texas, Houston Division filed
09/14/90	Superseding indictment filed
01/22/91	Trial began
01/23/91	Jury verdict of guilty returned
03/28/91	Government's Objections to Presentence Report filed
04/12/91	Defendant's Statement Concerning Presentence Report and Response to Government's Objections to Presentence Report filed
04/12/91	Defendant sentenced (Counts S1-S13) (Cts. S1, S3, S5, S7, S9 & S11—168 mos. to serve as to each count to run concurrently. Ct. S13—120 mos. to serve to run concurrently with sentence in Cts. S1, S3, S5, S7, S9 & S11. Ct. S2—5 yrs. to serve to run consecutively to sentence in Cts. S1, S3, S5, S7, S9 & S11. Cts. S4, S6, S8, S10 & S12—20 yrs. to serve as to each count to run consecutively to each other and consecutively to sentence of all other counts, for a total of 119 yrs. or 1,428 mos. to serve.
04/16/91	Notice of Appeal filed
04/26/91	Judgment and Commitment issued
02/07/92	Opinion of the Court of Appeals for the Fifth Circuit, affirming District Court judgment, issued

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Number H-90-315-S

UNITED STATES OF AMERICA

v.

THOMAS LEE DEAL

INDICTMENT

[Filed September 14, 1990]

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about January 24, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Kelly Marie Miller approximately $7,214 cash money belonging to and in the care, custody, control, management, and possession of Ameriway Bank, located at 2900 North Loop West in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Kelly Marie Miller in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT TWO

On or about January 24, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count One, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT THREE

On or about February 23, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Kelly Marie Miller approximately $8,000 cash money belonging to and in the care, custody, control, management, and possession of Ameriway Bank, located at 2900 North Loop West in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation.

[Violation: Title 18, United States Code, Section 2113(a)]

COUNT FOUR

On or about February 23, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Three, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT FIVE

On or about March 1, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Evelyn Benitez approximately $6,978 cash money belonging to and in the care, custody, control, management, and possession of Charter Bank, located at 2401 Fountainview in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Evelyn Benitez in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT SIX

On or about March 1, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Five, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT SEVEN

On or about March 5, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Donna Mock approximately $5,916 cash money in the care, custody, control, management, and possession of Charter Bank, located at 5433 Westheimer in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Donna Mock in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT EIGHT

On or about March 5, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence to wit: the bank robbery described in Count Seven, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT NINE

On or about March 13, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Denise Lazeby approximately $17,295 cash money in the care, custody, control, management, and possession of First Texas Bank, located at 755 Post Oak in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Denise Lazeby in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT TEN

On or about March 13, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a fire-

arm during the commission of a crime of violence, to wit: the bank robbery described in Count Nine, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT ELEVEN

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Evelyn Benitez approximately $7,037 cash money in the care, custody, control, management, and possession of Charter Bank, located at 2401 Fountainview in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Evelyn Benitez in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113 (a) and (d)]

COUNT TWELVE

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Eleven, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT THIRTEEN

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, previously convicted of conspiracy to commit bank

robbery and bank robbery in United States District Court for the Northern District of Texas on February 20, 1976 and of unlawfully escaping the custody of the Attorney General in United States District Court for the Eastern District of Texas on December 6, 1982, each crime punishable by imprisonment for a term exceeding one year, knowingly possessed two firearms in and affecting commerce, to wit: two guns.

[Violation: Title 18, United States Code, Sections 922(g)]

A TRUE BILL:

/s/ Thelma Moore
Foreperson of the Grand Jury

STEPHEN S. MORRIS
United States Attorney

By: /s/ D. R. Millard III
D. R. MILLARD III
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted in Printing)

GOVERNMENT'S OBJECTIONS TO THE PRESENTENCE REPORT

[Filed March 28, 1991]

TO THE HONORABLE JUDGE OF SAID COURT:

The United States of America, by and through Ronald G. Woods, United States Attorney in and for the Southern District of Texas, makes and files these Objections to the Presentence Report.

I.

First, in the presentence report, the Probation Department does not assess points for a number of the defendant's prior convictions, in calculating his criminal history category, and does not categorize the defendant as a career offender. The United States maintains that points should be assessed for those convictions and that he should be categorized as a career offender under § 4B1.1 of the Sentencing Guidelines, based on the cases of *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989), *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990), *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990), and Congress' intent as set forth in Title 28, United States Code, Section 994(i).

Thomas Lee Deal was convicted on February 20, 1976 in the United States District Court for the Northern District of Texas, Dallas Division, for five (5) bank robberies: Docket No. *CR-3-75-420*—he received a five

year sentence and a twenty year sentence, to run concurrently, for conspiracy to commit bank robbery and for armed bank robbery committed on September 17, 1974; Docket No. *CR-3-76-025*—pursuant to a Rule 20 transfer, he received three twenty year sentences, to run concurrently to one another and to the sentences just described, for bank robberies committed on January 23, 1973, March 14, 1973, and November 11, 1974 in the Southern District of Texas; and Docket No. *CR-3-76-026*—he received a ten year sentence, to run consecutive to the other sentences, for an armed bank robbery committed on September 4, 1974. He was also convicted on June 10, 1976 in the 196th Judicial District Court, Hunt County, Texas for aggravated robbery. He received a five to twenty five year sentence in the Texas Department of Corrections (now the Texas Department of Criminal Justice—Institutional Division), to be served consecutive to the federal sentences. The bank robbery that was the basis for that conviction was the September 17, 1974 robbery for which he was sentenced federally in Docket No. *CR-3-75-420*.

The issue of criminal history category calculation and career offender status hinge on interpretation of the same language in the Sentencing Guidelines. However, the United States will treat them separately herein for the Court's (and the United States') convenience.

a. *Criminal History Category Calculation*

The Probation Department assessed three points for the conviction in *CR-3-75-420* but did not assess points for the convictions in *CR-3-76-025* or *CR-3-76-026*, "as [these sentences were] imposed . . . on the same date as [*CR-3-75-420*], and [are] considered . . . related case[s] for guideline computations." See paragraph 104 of the presentence report.

As the Court is aware, § 4A1.1 of the Sentencing Guidelines is the relevant provision regarding criminal history

category calculations. That section provides in pertinent part as follows:

> The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each *prior sentence* of imprisonment exceeding one year and one month. (emphasis added)

Prior sentence is defined in § 4A1.2(a)(1) of the Sentencing Guidelines as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." However, § 4A1.2(a)(2) provides that:

> Prior sentences imposed in *unrelated cases* are to be counted separately. Prior sentences imposed in *related cases* are to be treated as one sentence for purposes of the criminal history. (emphasis added)

Application Note 3 to § 4A1.2 defines *related cases* as follows:

> *Related Cases.* Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history, and the danger he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrest, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. *See* § 4A1.3.

Presumably, although the presentence report does not specifically so state, the basis for the Probation Department's decision is the language in Application Note 3 to § 4A1.2 which states that cases are related if they are consolidated for sentencing (i.e., Mr. Deal's convictions/cases are related because he was sentenced on the same day by Judge Porter for all of the offenses).

The issue is: what does "cases are considered related if they . . . were consolidated for sentencing" actually mean? The Probation Department's decision not to assign criminal history points for the other convictions indicates that it interprets that language to mean that when the sentences for different cases are imposed on the same day/at the same proceeding, the cases are considered consolidated for sentencing and, therefore, related. The United States disagrees. This interpretation defeats one of the goals of the Sentencing Guidelines:

> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions . . . .

Title 28, United States Code, Section 994(i).

It also appears to conflict with the Fifth Circuit's decisions in *United States v. Flores* (panel consisting of Judges Wisdom, King, and Williams), *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990), (panel consisting of Judges Clark, Reavley, and King) and *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990) (panel consisting of Judges King, Garwood, and Smith).

In *United States v. Flores*, the defendant had six prior burglary convictions. The court examined the meaning of

"related cases," albeit in the context of determining his career offender status. (The meaning of "related cases" is the critical determination for purposes of criminal history category calculation too, as both criminal history category calculation and career offender status depend on that determination.) Two of those robberies were consolidated for trial and three others were also consolidated for trial, for a total of three trials. The court states that all six cases were consolidated for sentencing and that the six sentences ran concurrently, but it appears from the court's description that three judges imposed three sentences, which ran concurrently. Thus, the Fifth Circuit indicates that Flores' argument was: the convictions were consolidated for sentencing because the six sentences ran concurrently. The court reasoned that "[s]imply because two convictions have concurrent sentences does not mean that the crimes are "related" under Part A." *United States v. Flores*, 875 F.2d at 1114. The court states that:

> Mere concurrent sentences are not enough to defeat the policy of the Guidelines:
>
> > "The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—(1) has a history of two or more prior federal, state, or local felony convictions for offenses committed *on different occasions* . . . ." 28 U.S.C. § 944(i) (emphasis added).

Id. The Fifth Circuit looked at the underlying reality of the sentences and stated that "[w]hile there may or not have been six separate sentencing proceedings, there were at least three, and two were all that were needed under the definition of a career offender." *Id.*

In *United States v. Paulk*, the Fifth Circuit expands this reasoning. In that case, the defendant was sentenced, for his two prior convictions, on the same day and the sentences ran concurrently. The defendant argued that

the court should have treated these offenses as related, for purposes of criminal history category calculation, which it did not. The Fifth Circuit dismissed the defendant's argument:

> The convictions in question were the result of two separate criminal acts; possession of a controlled substances in 1984 and possession of a controlled substance in 1985. Thomas does not allege that the two convictions are factually related. Simply because sentences run concurrently and were imposed on the same day does not require the sentence to be consolidated for guideline purposes absent a showing of a close factual relationship between the convictions. *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989). The district court's computation of Thomas' criminal history score was not error.

United States v. Paulk, 917 F.2d at 884. (See also *United States v. Metcalf*, 898 F.2d at 46, wherein the court holds similarly under very similar facts.)

These three cases argue against the Probation Department's interpretation and provide a basis for the assessment of criminal history points for the defendant's prior convictions. The defendant was sentenced for all five robberies on the same day, February 20, 1976. The sentences for four of the robberies (one robbery, *CR-3-75-420*, and three robberies, *CR-3-76-025*) ran concurrently; the sentence for the other robbery (*CR-3-76-026*) ran consecutive to the other four. Furthermore, each of the five robberies took place on a different day.

The real issue is how this Court is going to interpret the language: "cases are considered related if they . . . were consolidated for sentencing." It seems clear that the Fifth Circuit is not inclined to allow a literal reading of the definition of "related cases" to defeat the underlying policy of the Guidelines. However, the Fifth Circuit has made it difficult to envision a circumstance where "cases

were consolidated for sentencing" and are, therefore, related. In other words, if "cases are consolidated for sentencing" does *not* mean concurrent sentences and, further, does not mean concurrent sentences imposed in the same sentencing proceeding, when are cases consolidated for sentencing?

In *United States v. Flores*, the court looked to the fact that there were three sentencing proceedings and to the policies behind the Sentencing Guidelines, albeit in the context of a decision about career offender status. The fact that the sentences ran concurrently was not determinative, so cases are not consolidated just because the sentences imposed in those cases run concurrently.

In *United States v. Paulk*, the court states that the fact that the sentences ran concurrently and were imposed on the same day does not mean that the cases were consolidated for sentencing, thereby shutting off what appeared to be the crack in the door from *United States v. Flores*, namely, whether there was more than one sentencing proceeding. The court focused on the absence of any factual connection between the two convictions in finding that the cases were not related. The court in *United States v. Metcalf* did the same thing.

As stated before, as a result of these three cases, it is difficult to imagine when two cases are "consolidated for sentencing" without defeating the policy of the Sentencing Guidelines set forth in Title 28, United States Code, Section 994(i). Perhaps cases are consolidated for sentencing when the sentences run concurrently and are imposed at one proceeding, and when the underlying offenses are factually related. This seems to be the implication in both *Paulk* and *Metcalf*, which emphasize the importance of a factual relationship between the offenses giving rise to the convictions. (There is some disagreement between the circuits on this issue. See, for example, *United States v. Gross*, 897 F.2d 414 (9th Cir. 1990) wherein the Ninth Circuit ignores Application Note 3 in

holding that a single sentencing proceeding and concurrent sentences did not make cases "related," and *United States v. Davis*, 922 F.2d 1385 (9th Cir. 1991) wherein a different panel of the Ninth Circuit came to the same conclusion as the Fifth Circuit in *Paulk* and *Metcalf*. Or *United States v. Bishop*, 921 F.2d 1069 (10th Cir. 1990) wherein the court upheld the district court's upward departure in accordance with §§ 4A1.2 and 4A1.3 of the Sentencing Guidelines because his three prior felonies were all "consolidated for sentencing," i.e., sentences imposed during the same sentencing proceeding but no criminal history points were assessed. Or *United States v. Delvecchio*, 920 F.2d 810, 812 (11th Cir. 1991) wherein the court held that cases consolidated pursuant to Rule 20 "was the type of consolidation the guidelines contemplated" and so no criminal history points were assessed.)

In any event, it appears that Congress was instructing the Sentencing Commission to develop sentencing guidelines that punish criminals with significant criminal histories—"two or more prior Federal, State, or local felony convictions for offenses committed on different occasions" —more severely than those with one or no prior convictions. Unfortunately, the Sentencing Commission did not choose its words as carefully as it might have with regard to the language at issue here. It would have been clearer if the Commission had used language like "cases are considered related if the sentences imposed run concurrently" or "cases are considered related if sentences are imposed at one sentencing proceeding and if those sentences run concurrently," although such language would probably give rise to a different set of problems. Congress' intent, as best one can glean it from the language in Section 994(i), is to punish criminals with two or more offenses committed on different occasions. Thus, the Fifth Circuit's interpretations appear to be an attempt to implement Congressional intent in the context of the relevant Sentencing Guideline provision, rather than merely to interpret the Sentencing Guidelines lan-

guage. The appropriateness of this is difficult to assess because the Sentencing Commission and, consequently, the Sentencing Guidelines are such unique creatures. Of course, the Sentencing Commission can address the issue in its next revision of the Sentencing Guidelines, but that does not affect the decision before the Court in the instant case. Perhaps the Sentencing Commission was aware that the language at issue herein was problematic and, therefore, included the cautionary language after the first sentence of Application Note 3 to § 4A1.2 (quoted at pp. 3-4 supra). And, perhaps, upward departure, rather than criminal history point assessment or career offender categorization, is the appropriate remedy for the issues raised, even though the Fifth Circuit does not seem to think so.

The Probation Department indicates in the presentence report that 105 years, to run consecutive to any sentence for the armed robberies, is the appropriate sentence for the six 18 USC 924(c) counts of which the defendant was convicted. The United States agrees. And while the severity of this portion of the defendant's sentence appears to nullify the importance of the issues addressed in these Objections, appearances can be deceiving.

Counsel for the defendant has indicated her intention to appeal the 105 year portion of the sentence, if the Court imposes that sentence. The United States maintains that the Court has no discretion, as Title 18, United States Code, Section 924(c) mandates punishment at five years for the first conviction and twenty years for second or subsequent conviction and further requires that the sentences run consecutive to one another and any other sentence for the underlying offenses. There is not a wealth of cases interpretting "second or subsequent convictions" but the language is not ambiguous, as the court stated in *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir. 1987) wherein the court held that "appellant's second conviction under § 924(c), even though in the same indictment as his first conviction, legitimately triggers the enhancement provision." However, should the Fifth Circuit come to a different conclusion, then the issues raised herein become very important.

Clearly, Mr. Deal's criminal history category calculation does not accurately reflect his criminal history in the context of Section 994(i) and the two Fifth Circuit cases discussed. Based on those two cases, points should be assessed for all five prior convictions, as none are factually related. Also, neither the fact that the sentences in four ran concurrently, nor the fact that all sentences were imposed in one proceeding, is determinative.

The defendant also did not receive criminal history points for the state conviction imposed on June 10, 1976. The basis for this decision not to assess points is also Application Note 3. See Paragraph 114 of the presentence report. However, discussion of this issue is more pertinent to the career offender status determination and so is addressed below.

b. *Career Offender Status*

The defendant, Thomas Lee Deal, is more than 18 years of age, the instant offense of conviction is a crime of violence, and the defendant has at least two prior felony convictions of crimes of violence. Therefore, he is a career offender and his offense level should be 34, rather than 30. See § 4B1.1 of the Sentencing Guidelines.

The issue is whether the defendant's prior convictions constitute "two prior felony convictions" under the definition in § 4B1.2 of the Sentencing Guidelines. That section states that:

> The term "two prior felony conviction" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . and (B), the sentences for at least two

> of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter.

Bank robbery is a crime of violence. Again, § 4A1.2(a)(2), the relevant provision of Part A, provides as follows:

> Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history.

And, again, Application Note 3 to § 4A1.2 defines related cases as follows:

> *Related Cases.* Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overy broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrest, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. *See* § 4A1.3.

Thus, the question is whether the fact that the robbery that was the basis of the state conviction was also one of the robberies for which he was convicted federally (*CR-3-75-420*) means that the two cases "occurred on a single occasion" and, therefore, are related. If so, the defendant will not be categorized as a career offender. This is the position taken by the Probation Department

in the presentence report. See paragraph 114 of the presentence report.

The United States maintains that these two convictions are "two prior felony convictions." The position that the state sentence is related to the federal sentence because the robbery that is the basis of the state sentence is the same robbery as the one in *CR-3-75-420* requires an overly technical reading of the definitions and defeats the above-referenced goal of the Sentencing Guidelines:

> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions. . . .

Title 28, United States Code, Section 994(i).

The Fifth Circuit did not address this issue in *United States v. Flores*, *United States v. Paulk*, or *United States v. Metcalf* and the Assistant United States Attorney handling this case has not been able to find any cases addressing the issue. However, it seems clear that the Probation Department's interpretation, while understandable, does not give adequate consideration to the intent of Congress.

Thomas Lee Deal was convicted in federal court on February 20, 1976 for five bank robberies; he was convicted on June 10, 1976 in state court for one of those robberies (i.e., he was convicted twice for the same robbery by different sovereigns). "Cases are considered related if they . . . occurred on a single occasion." The state case and *CR-3-75-420* occurred on a single occasion, but the state case and the other four robberies for which he was convicted in federal court did not occur on a single occasion. To allow *CR-3-75-420* to subsume all five robberies for purposes of a determination as to whether the state case and the federal cases are "related" is to put

form ahead of substance. In a slightly different context, the Fifth Circuit has indicated that it is not willing to do this.

II.

Second, the presentence report indicates that Ms. Miller did not see a gun in this robbery. That is not what the evidence at trial indicated. Ms. Miller testified that she saw part of the gun. Again, this error is not Karen Norris' fault. The information appears incorrectly in the agent's report.

Third, the presentence report indicates that the dollar amount stolen in the second robbery (Ameriway Bank on February 23, 1991) was $8,000. Karen Norris indicated that she obtained that information from the indictment and the agent's report. Evidence at trial revealed that the amount stolen was approximately $7,000. The difference does not affect sentencing, according to the Sentencing Guidelines.

Fourth, one of the tellers referred to is Ms. Janice Hollon. Her name appears in the presentence report as Janice Hollow.

Respectfully submitted

RONALD G. WOODS
United States Attorney

By: /s/ D. R. Millard III
D. R. MILLARD III
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

(Caption Omitted in Printing)

STATEMENT CONCERNING PRESENTENCE REPORT AND RESPONSE TO GOVERNMENT'S OBJECTIONS TO PRESENTENCE REPORT

[Filed April 12, 1991]

The defendant, THOMAS LEE DEAL, files these objections to part of the Presentence Investigation Report (PSI) and responses to the government's objections to the PSI:

I.

After a review of the entire PSI, THOMAS LEE DEAL, objects only to the computation of the guideline sentence.

II.

The probation officer has suggested that 105 years is the appropriate sentence for Counts 2, 4, 6, 8, 10 and 12. THOMAS LEE DEAL disagrees and urges the Court to find that thirty years is the appropriate sentence due to the ambiguity of the statute.

III.

The probation officer bases the 105 year sentence on the language of 18 U.S.C. § 924(c) which states that the sentence for second or subsequent convictions is twenty years. It is the defendant's position that the sentence for each count under 18 U.S.C. § 924(c) is five years. *See United States v. Luskin*, 926 F.2d 380 (4th Cir. 1991);

United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988). The statute is clearly ambiguous on the meaning of "second or subsequent convictions." If twenty years were the appropriate sentence for convictions in the same indictment, then there would be no need to modify "convictions" with "second or subsequent." Twenty years would be the appropriate sentence in the facts presented herein only if the convictions were received at a later time.

There is virtually no legislative history on this statute and this question has not been presented to the Fifth Circuit Court of Appeals. When facing such a situation and the statute is clearly ambiguous, the court should apply a policy of lenity as the United States Supreme Court instructed in *Simpson v. United States*, 435 U.S. 6 (1978). In that case, the Court stated that " '[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

IV.

The government first objects to the probation officer's criminal history point assessment. The state court conviction for the robbery of the State National Bank in Caddo Mills cannot be counted separately under § 4A1.2 of the Sentencing Guidelines because it is clearly related to the federal court conviction for that very same robbery. There can be no better factual relationship, as the Guidelines call for, than the very same criminal episode. As cited by the government in its objections, the reasoning in *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990) is clearly applicable. In that case, the court focused on the absence of any factual connection between the two convictions to find that the two cases were not related. Thus, no points should be assessed for the state court conviction in Mr. Deal's case.

The cases referred to in the PSI that arose in the Southern District of Texas and were transferred to the Northern District of Texas pursuant to Rule 20 of the Rules of Criminal Procedure should not be assessed points. Rule 20 consolidation for sentencing falls within § 4A1.2 (a) (2) of the Sentencing Guidelines, which defines related cases as those consolidated for trial or sentencing. *See United States v. Delvecchio*, 920 F.2d 810, 812 (11th Cir. 1991).

The government relies on "gleaning" the intent of Congress from 28 U.S.C. § 994(i). As the government concedes, it is not clear how the Sentencing Commission defines the language "consolidated for sentencing." Again, when the language is ambiguous and congressional intent cannot be determined, the rule of lenity should be applied. *See Simpson, supra.*

V.

The government also objects that Thomas Lee Deal was not assessed career offender status. As the government points out, the issue is whether the defendant's prior convictions constitute "two prior felony convictions" under the definition in § 4B1.2 of the Sentencing Guidelines. Section 4B1.2 requires that the two prior felony convictions must have been assessed sentences that are counted separately under Part A. For the reasoning set out in paragraph IV, Mr. Deal does not have the requisite two prior felony convictions and, therefore, cannot be categorized as a career offender under § 4B1.1 of the Sentencing Guidelines.

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Admissions ID No. 3198

/s/ Dola Young
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted in Printing)

(TRANSCRIPT OF PROCEEDINGS OF APRIL 12, 1991) (pp. 2-5)

* * * *

[2] THE COURT: I call for sentencing at this time: 90-315-S, United States versus Thomas Lee Deal.

MR. MILLARD: Duke Millard, for the United States.

MS. YOUNG: Dola Young, for Mr. Deal.

THE COURT: And this is Mr. Deal.

Mr. Deal, have you gone over the Pre-Sentence Report?

THE DEFENDANT: Yes, sir.

THE COURT: You are thoroughly familiar with what's in it?

THE DEFENDANT: Yes, sir.

THE COURT: I have the government's objections to the Pre-Sentence Report as well as Ms. Young's objections. If there is anything you would like to add, counsel, I would be glad to hear it at this time.

What says the government?

MR. MILLARD: Well, Your Honor, I don't know exactly how the Court intends to proceed, I don't know whether the Court wants me to go through my entire objections. There's nothing in addition, other than what's in the objections.

THE COURT: All right. And Ms. Young.

MS. YOUNG: Your Honor, I would just like to make the point regarding the enhancement on the second or subsequent convictions. The whole point of enhancement is

to increase the sentence or provide extra punishment for those who, I guess [3] who did not learn their lesson from serving time the first time. And the whole purpose is defeated by sentencing, in this case, by a 105 years. Because Mr. Deal never had an opportunity to serve the first sentence by which he would be given an opportunity before being convicted a second time in receiving the enhanced punishment.

THE COURT: All right. Is there anything else you would like to tell me in his behalf?

MS. YOUNG: I would like to point out to the Court or perhaps refresh the Court's memory at the time of the suppression hearing when David Wells testified, one of the comments that he made was that Mr. Deal's claim to fame was that he had never hurt anyone. And I think that that goes to, while these are violent crimes, that says a lot about Mr. Deal's character. And that's it.

THE COURT: Mr. Deal, anything you would like to tell me?

THE DEFENDANT: No, sir, not really.

THE COURT: I guess I will continue sitting on this bench for the rest of my career never understanding how a man like you could get into what you got into.

I have analyzed the enhancement statute as carefully as I can and it seems to me perfectly obvious what Congress is telling us is that we must consider each of these firearms offenses as separate offenses. Mr. Deal, I don't have [4] much choice in this case.

On Counts 1, 3, 5, 7, 9, and 11, I sentence you to 168 months on each count, to be served concurrently.

On Count 13, I sentence you to 120 months, concurrent to the counts in 1, 3, 5, 7, 9, and 11.

On Count 2, I sentence you to five years to serve consecutive to the counts in 1, 3, 5, 7, 9, 11, and 13.

On Counts 4, 6, 8, 9—I'm sorry, 10 and 12, that's 4, 6, 8, 10, and 12, I sentence you to 20 years to serve on each count, to run consecutive to each other and to the Counts 1, 2, 3, 5, 7, 9, 11, and 13.

I will say this, if I had not read the statute the way I did, I would have been compelled, on the facts of this situation, to depart upward. Your prior convictions for five separate acts of bank robbery, abscounding from two separate parole jurisdictions, committing seven armed bank robberies where, admittedly, no one was hurt, but someone could have been killed, it is important not only that I punish you but that I incapacitate you.

Your attempt to escape from custody makes this a mandatory case.

While it seems unnecessarily redundant, I'm going to add five years of supervised release on Counts 1, 5, 7, 9, and 11 and three years of supervised release on 2, 3, 4, 6, 8, 10, 12, and 13, the terms all to run concurrent with each other [5] for a total period of five years.

Should you ever serve a period of supervised release, you will abide by the standard conditions.

I'm not going to order restitution in this case, although it's certainly appropriate, because there's no likelihood of your paying it, nor is there any likelihood of your paying a fine.

I impose a special assessment of $50 on each of the counts, for a total of $650.

I overruled the government's objections and the objections of defense counsel and adopt the Pre-Sentence Report as written.

Thank you very much.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

(Caption Omitted in Printing)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

[Entered April 29, 1991]

Dola Young, Defendant's Attorney

THE DEFENDANT:

☒ was found guilty on count(s) 1-13 on January 23, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:2113(a) & (d)	Robbing a bank by use of force at gunpoint	1-24-90 3- 1-90 3- 5-90 3-13-90 4-12-90	1, 5, 7, 9, 11
18:924(c)	Use and possession of a firearm during or in relation to a crime of violence	1-24-90 2-23-90 3- 1-90 3- 5-90 3-13-90 4-12-90	2, 4, 6, 8, 10, 12
18:2113(a)	Robbing a bank	2-23-90	3
18:922(g)	Unlawful receipt and possession of a firearm	4-12-90	13

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ It is ordered that the defendant shall pay a special assessment of $650.00, for count(s) 1-13, which shall be due ☒ immediately ☐ as follows:

Clerk, United States District Court, Attention: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid: UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.:
458-70-6892

Defendant's Date of Birth:
09-23-46

Defendant's Mailing Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

Defendant's Residence Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

April 12, 1991
Date of Imposition of Sentence

/s/ Norman W. Black
Signature of Judicial Officer

NORMAN W. BLACK
United States District Judge
Name & Title of Judicial Officer

4-26-91
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED SIXTY-EIGHT (168) MONTHS on Counts 1, 3, 5, 7, 9, & 11, each count to be served concurrent to each other;

ONE HUNDRED TWENTY (120) MONTHS on Count 13, to be served concurrent with Counts 1, 3, 5, 7, 9, & 11;

FIVE (5) YEARS on Count 2, to be served consecutive to Counts 1, 3, 5, 7, 9, 11, & 13:

TWENTY (20) YEARS on each of Counts 4, 6, 8, 10 and 12, to be served consecutive to each other and to Counts 1, 2, 3, 5, 7, 9, 11, and 13.

☒ The court makes the following recommendations to the Bureau of Prisons: None.

☒ The defendant is remanded to the custody of the United States marshal.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2407

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

THOMAS LEE DEAL,
Defendant-Appellant.

Appeal from the United District Court
for the Southern District of Texas

(February 7, 1992)
[Filed March 5, 1992]

Before REAVLEY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

DeMoss, Circuit Judge:

Thomas Lee Deal ("Deal") went on a crime spree in the Houston, Texas area, committing six armed robberies of various banks during the period of January through April 1990. In each robbery he used a gun. When caught, he was indicted in a 13 count superseding indictment with six counts of bank robbery involving offenses under 18 U.S.C. § 2113(a) and (d); six counts involving use of a deadly weapon during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in

possession of a firearm in violation of 18 U.S.C. § 922(g). The jury found Deal guilty on all counts. The probation office considered the six counts of 18 U.S.C. § 924(c) as six separate convictions and applied the statutory enhancement which raises the penalty from five years to twenty years per count for each of the "second or subsequent" convictions. This resulted in a sentence recommendation of 105 years on the § 924(c) counts and as Congress mandated, these sentences were to run consecutively. Deal made the proper objections to the trial court, but the district judge sentenced in accordance with the probation officer's recommendations.

Deal appealed on the single grounds of whether or not the District Court imposed the proper sentence in connection with the counts of conviction under 18 U.S.C. § 924(c). The issue raised by Deal is a question of law; and the standard of review is therefore *de novo*. *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990). This is the first occasion on which this Court has had to address this question.

The pertinent part of 18 U.S.C. § 924(c) provides:

> Whoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years, ... *In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years,* . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried. (emphasis added)

Deal urges that Congress' use of the disjunctive "second or subsequent" to modify "conviction" in § 924(c) creates an ambiguity because the meaning of "second" is subsumed into the meaning of "subsequent." Deal argues that under the plain meaning of "subsequent", the provision should be interpreted to require that an offender be convicted under *separate* indictments before the enhancement provision could apply. Since he was convicted for several offenses charged in the same indictment, Deal argues that he was not subject to a "subsequent conviction"; and, therefore, he should not have received an enhanced sentence.

The government contends that Congress included, "second or subsequent conviction" to cover both the situation where a defendant is convicted of more than one § 924(c) offense in one indictment and the situation where the separate offenses are charged in separate indictments. The government argues that Congress wisely put this language in to preclude prosecutors from having discretion to control the imposition of the enhancement by the manner of charging the offenses.

If this were a matter of first impression before any Circuit Court, we might be inclined to explore the controversy further. However, the Eleventh, Eighth, Sixth, Seventh and Fourth Circuits have previously determined that a "second or subsequent conviction" under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c). *See, United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987); *United States v. Hamblin*, 911 F.2d 551, 555 (11th Cir. 1990), *cert. denied sub. nom., Jones v. United States*, —— U.S. ——, 111 S.Ct. 2241 (1991); *United States v. Foote*, 898 F.2d 659, 668-69 (8th Cir.), *cert. denied sub. nom., Thompson v. United States*, —— U.S. ——, 111 S.Ct. 112 and *Williams v. United States*, —— U.S. ——, 111 S.Ct. 342 (1990); *United States v. Nabors*, 901 F.2d 1351, 1358-59 (6th Cir.), *cert. denied*,

—— U.S. ——, 111 S.Ct. 192 (1990); *United States v. Bennett*, 908 F.3d 189, 194-95 (7th Cir.) *cert. denied*, —— U.S. ——, 111 S.Ct. 534 (1990); *United States v. Luskin*, 926 F.2d 372, 375 (4th Cir.), *cert. denied*, —— U.S. 112 S.Ct. 68 (1991).

In the present case, each of counts 2, 4, 6, 8, 10, and 12, which were the counts alleging violations of § 924(c), related to bank robberies committed on different days involving different banks and different times. We hold, therefore, that the District Court correctly imposed the proper sentence in this case, including the enhancements resulting from "second or subsequent" convictions under 18 U.S.C. § 924(c).

For the foregoing reasons, the judgment is AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-8199

THOMAS LEE DEAL,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 5, 1992

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 91-8199

In The

Supreme Court of the United States

October Term, 1992

THOMAS LEE DEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Petitioner's fifth amendment due process rights were violated by not applying the rule of lenity to the "second or subsequent conviction" language in 18 U.S.C. § 924(c)(1).

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The opinion of the court of appeals (J.A. 31) is reported at 954 F.2d 262 (5th Cir. 1992). The judgment of the district court (J.A. 28) is not reported.

JURISDICTION

The decision of the court of appeals (J.A. 31) was announced on February 7, 1992. The petition for certiorari was filed on May 7, 1992. Certiorari was granted on October 5, 1992. (J.A. 35). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . " U.S. Const. amend. V.

STATUTORY PROVISION INVOLVED[1]

Section 924(c) of Title 18, United States Code provides, in pertinent part:

> (1) Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm,

[1] The full text of 18 U.S.C. § 924(c)(1) (1988) is set out in the Appendix to this Brief at A-1.

shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried.

STATEMENT

The Petitioner, Thomas Lee Deal, was charged in a thirteen-count superseding indictment with six different bank robberies, in violation of 18 U.S.C. § 2113(a) and (d); with six different uses of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (J.A. 2).

A jury returned a verdict of guilty on all counts. (J.A. 28). After the verdict, but prior to sentencing, the United States Probation Office prepared a presentence investigation report, which recommended that the court impose a sentence of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c)(1). (R. Tab 58, filed under seal). Pursuant to local procedure, the Petitioner timely filed a written statement in which he objected to the proposed sentence of 105 years on the ground that the twenty-year enhancement was not applicable to five of the six section 924(c) violations. (J.A. 21).

At the sentencing hearing, counsel elaborated on the written objections. (J.A. 25-26). The district court overruled the objections and sentenced the Petitioner to serve a term of imprisonment of 168 months for the bank robberies and for being a felon in possession of a firearm, followed by a term of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c). (J.A. 26-27). The district court's rationale for imposing the 105-year sentence was that Congress intended for a defendant to be sentenced to a consecutive term of five years' imprisonment for the first violation of section 924(c) and to a consecutive term of 20 years on each of the remaining five violations. (J.A. 26).

The Petitioner timely appealed to the Fifth Circuit Court of Appeals. On February 7, 1992, that court entered its opinion affirming the Petitioner's conviction and sentence, concluding that earlier decisions in other circuits had properly decided that a first conviction and a "second or subsequent conviction" under 18 U.S.C. § 924(c) can result from the same indictment. *United States v. Deal*, 954 F.2d 262, 263 (5th Cir. 1992). (J.A. 33-34).

This Court granted certiorari on October 5, 1992. (J.A. 35).

SUMMARY OF ARGUMENT

I.

Because "second or subsequent conviction" is ambiguous, the Court must look to the legislative history of 18 U.S.C. § 924(c)(1) for elucidation of its meaning.

A. The text of a statute is ambiguous if, after examination, a reasonable doubt persists about its intended scope. *See Moskal v. United States*, 111 S. Ct. 461, 465 (1990); *cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992). The Court should look to the legislative history of the statute for elucidation if the text is ambiguous. *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

B. "Second or subsequent conviction" is ambiguous. The words "second" and "subsequent" mean "another," "next after the first in time," or "occurring later." *See Random House Dictionary of the English Language* 1729, 1876 (2d ed. unabridged 1987). The statute does not indicate which of these meanings Congress intended. The language of the statute also does not clarify whether "or" is used to correlate or distinguish the meanings of "second" and "subsequent." *Compare Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), *with DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956). Finally, "conviction" means either the return of a jury verdict of guilt or the entry of a final judgment on that verdict. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983); *Lott v. United States*, 367 U.S. 421, 427 (1961). Even if the statute is interpreted in light of these multiple meanings, nothing in the text or structure of section 924(c) indicates whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time."

C. Lower courts that have found "second or subsequent conviction" to be unambiguous have ignored the ambiguity of "conviction" or have presumed that it has only one meaning. *See, e.g., United States v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992); *United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991); *United States v. Rawlings*, 821 F.2d 1543, 1545-46 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987).

D. In sum, because a reasonable doubt persists about the meaning of "second or subsequent conviction," the Court must look to the legislative history of section 924(c). *See Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

II.

The legislative history of section 924(c) does not resolve the ambiguity of "second or subsequent conviction."

A. Section 924(c) "was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff." *Simpson v. United States*, 435 U.S. 6, 13 (1978). The amendment passed on the same day it was offered. *See Busic v. United States*, 446 U.S. 398, 405 (1980). Thus, the Court must search for clues to legislative intent from the "sparse pages of floor debate." *Id.* The sponsor of section 924(c) intended that, if a person uses a gun and "is caught and convicted, he is going to jail . . . [and] if he does so a second time, he is going to jail for a longer time." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff). These sparse comments do not compel a particular interpretation of "second or subsequent conviction." *See S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972).

B. The inquiry into the meaning of "second or subsequent conviction" is not advanced by reliance on the general desire of Congress to deter firearm abuses. *See Busic*, 446 U.S. at 408. The desire of Congress was not unbounded, and the Court's "task here is to locate one of the boundaries." *Id.*

C. Although a review of other federal, recidivist statutes ordinarily might assist the inquiry, *see, e.g., Dickerson*, 460 U.S. at 115, it sheds little light on the language of section 924(c) because of "the haste in this legislation" and the "considerable confusion as to the meanings of words" when it was offered and passed. 114 Cong. Rec. 22,243 (1968) (statement of Rep. Hunt, supporting the Casey amendment). Nevertheless, various federal statutes impose an enhanced punishment on an offender only when he has a *prior* conviction. *See, e.g.*, 21 U.S.C. §§ 841 (b)(1)(A), (B), 844(a), 860(b) (1988). If these statutes are relevant to the inquiry, their language supports the interpretation that "second or subsequent conviction" means "an additional judgment of conviction entered later in time."

III.

The Petitioner's due process rights were violated by the failure of the lower courts to apply the rule of lenity to "second or subsequent conviction."

A. The rule of lenity is not merely a convenient statutory maxim, but also is "rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979). The rule is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon " 'the instinctive distaste against

men languishing in prison unless the lawmaker has clearly said they should.' " *United States v. Bass*, 404 U.S. 336, 347-48 (1972), *quoted in R.L.C.*, 112 S. Ct. at 1338. Thus, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

B. The first time the Petitioner ever was haled into court for any violation of section 924(c) he was sentenced to serve a term of 100 years in prison for five of the six violations charged under the statute. Because "second or subsequent conviction" could mean "an additional finding of guilt rendered at any time" or "a judgment of conviction entered at a later time," the Petitioner did not have fair warning of what the law intended to do or that he would be sentenced to languish in jail for 100 years. Thus, his due process rights were violated by the failure of the lower courts to apply the rule of lenity.

C. Because the rule of lenity applies in this case, the Court must choose the construction yielding the shorter sentence. *R.L.C.*, 112 S. Ct. at 1338. For this reason, the Court should hold that "second or subsequent conviction" means "an additional judgment of conviction entered later in time."

ARGUMENT

I. BECAUSE THE MEANING OF "SECOND OR SUBSEQUENT CONVICTION" IS AMBIGUOUS AS USED IN THE STATUTORY TEXT, THE COURT MUST LOOK TO THE LEGISLATIVE HISTORY OF 18 U.S.C. § 924(c).

A. When the Statutory Text Is Ambiguous, the Court Must Examine the Legislative History of the Statute.

In all cases involving statutory interpretation, this Court looks "first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990). When construing the language, the Court has long held that Congress uses words as they are commonly and ordinarily understood. *See Moskal v. United States*, 111 S. Ct. 461, 465 (1990); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Richards v. United States*, 369 U.S. 1, 9 (1962). It is assumed, therefore, that the plain meaning of a statute is apparent from its terms. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Any interpretation of those terms must give " 'effect, if possible, to every clause and word of a statute.' " *Moskal*, 111 S. Ct. at 466 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

Although the precise criterion for statutory ambiguity is difficult to establish in the abstract, *see Moskal*, 111 S. Ct. at 465, it is clear that statutory ambiguity is the "touchstone" for cases involving the rule of lenity. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). In this context, a statutory provision is ambiguous if a reasonable doubt persists about the provision's intended scope. *See Moskal*,

111 S. Ct. at 465; *cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992) (employing criterion of whether two plain meanings of a term are equally consistent with the statutory text).

The Court should look to the legislative history to ascertain the legislative intent if the language of a statute is ambiguous. *See R.L.C.*, 112 S. Ct. at 1334; *Chapman v. United States*, 111 S. Ct. 1919, 1926 (1991); *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment) (stating that a finding of ambiguity ends the matter and that the rule of lenity then applies). Thus, the threshold question is whether the language of section 924(c) is ambiguous.

B. The Meaning of "Second or Subsequent Conviction" Is Ambiguous, as Used in the Statutory Text.

In pertinent part, 18 U.S.C. § 924(c) provides as follows:

> (1) Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . . *In the case of his second or subsequent conviction* under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment

> including that imposed for the crime of violence . . . in which the firearm was used or carried.

18 U.S.C. § 924(c)(1) (1988) (emphasis added); *see infra* note 9 (discussing history of amendments).

"In the case of his second or subsequent conviction" is ambiguous, when it is applied to multiple violations of section 924(c) that are charged in one indictment. It is difficult, if not impossible, to give effect unambiguously to every clause and word in attempting to discern its meaning. First, although the meanings of "second" and "subsequent" can be distinguished, they also overlap. The generally accepted pertinent definitions of "second" are: (1) next after the first, being the ordinal number for two; (2) next after the first in place, time, or value; and (3) other or another. *See Random House Dictionary of the English Language* 1729 (2d ed. unabridged 1987) (listing twenty-nine definitions). "Subsequent" is defined in two ways: (1) occurring or coming later or after; and (2) following in order or succession. *Id.* at 1876. The language of the statute does not indicate whether Congress intended "second or subsequent conviction" to apply merely to "another" conviction "following in order" after the first, or to a conviction "coming later" than the first or "next after the first in . . . time."

Second, the meaning of "second or subsequent" depends on the use of the word "or." When words are connected by the disjunctive "or," they ordinarily are to be given separate meanings. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The word "or" also may be used as a careless substitute for the word "and" in phrases where "and" would express the thought with greater clarity.

DeSylva v. Ballentine, 351 U.S. 570, 573 (1956). The language of the statute does not clarify whether "or" was used to correlate or distinguish the meanings of "second" and "subsequent."[2]

Finally, because the word "conviction" is ambiguous, the applicability of the twenty-year enhancement under 18 U.S.C. § 924(c) also is unclear when one indictment charges more than one violation of the statute. "Conviction" is not defined in section 924(c),[3] and it can mean either the return of a jury verdict of guilt or the entry of a final judgment on that verdict. *See Black's Law Dictionary* 331-32 (6th ed. 1990); *see also Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983); *Lott v. United States*, 367 U.S. 421, 427 (1961). The meaning varies from statute to statute. *Dickerson*, 460 U.S. at 113 n.7. In some statutes, the term is specifically defined. *Id.* at 112 n.6. As noted in the dissenting opinion in *Dickerson*, nothing in the plain language of the Gun Control Act, of which section 924(c) is a part, indicates which meaning Congress intended. *Id.* at 123-24 (Rehnquist, C.J., dissenting). The text of the statute is "at least equally consistent" with both meanings. *R.L.C.*, 112 S. Ct. at 1334.[4]

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[2] *See infra* note 7.

[3] The only terms defined in the section are "drug trafficking crime," *see* 18 U.S.C. § 924(c)(2), and "crime of violence," *see* 18 U.S.C. § 924(c)(3).

[4] The phrase "in the case of his" serves only to exacerbate the ambiguity because it is unclear whether its intended meaning is "in the event of" or literally "in the legal case of." *See Random House Dictionary of the English Language* 321 (2d ed. unabridged 1987).

In short, a reasonable doubt persists as to the intended scope of "second or subsequent conviction." *See Moskal*, 111 S. Ct. at 465. As concluded by the Tenth Circuit:

> '[S]econd or subsequent' can be read to describe either multiple events occurring at one time or multiple events occurring in chronological sequence. 'Conviction' can refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict.

United States v. Abreu, 962 F.2d 1447, 1450 (10th Cir. 1992) (en banc). Thus, it is unclear whether the scope of the text covers a defendant who "is charged in one indictment with more than one section 924(c) offense and a single judgment of conviction is entered on that indictment." *Id.*

C. Lower Courts Have Ignored the Ambiguity of "Conviction."

No court of appeals, other than the Tenth Circuit, has found "second or subsequent conviction" to be ambiguous.[5] Holding that the language is clear, a number of courts rely on the reasoning of the Fourth and Eleventh

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[5] *See United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6 (9th Cir. Oct. 5, 1992); *United States v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992); *United States v. McGee*, 952 F.2d 398 (4th Cir. 1991) (unpublished), No. 90-5762, 1991 U.S. App. LEXIS 29757, at *16 – *17 (4th Cir. Dec. 20, 1991); *United States v. Livingston*, 941 F.2d 431, 435-36 (6th Cir. 1991); *United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991); *United States v. Grinnell*, 915 F.2d 667, 668 (11th Cir. 1990) (per curiam); *United States v. Hamblin*, 911 F.2d 551, 552-55 (11th Cir. 1990), *cert. denied sub nom. Jones v. United States*, 111 S. Ct. 2241 (1991); *United States v. Bennett*, 908 F.2d 189, 194-95 (7th Cir.), *cert. denied*, 111 S. Ct. 534 (1990); *United States v. Nabors*, 901 F.2d 1351, 1357-59 (6th Cir.), *cert. denied*, 111 S. Ct. 192 (1990); *United States v. Foote*, 898 F.2d 659, 668-69 (8th Cir.), *cert. denied sub nom. Thompson v. United States*, 111 S. Ct. 112 (1990); *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987); *cf. United States v. Luskin*, 926 F.2d 372, 374 n.2 (4th Cir. 1991) (affirming consecutive five-year sentence, but declining to address enhancement because it was not raised by the government); *United States v. Torres*, 862 F.2d 1025, 1032 (3d Cir. 1988) (affirming section 924(c) sentence, but declining to address the enhancement issue because of the government's stipulation to one sentence); *United States v. Fontanilla*, 849 F.2d 1257, 1258 (9th Cir. 1988) (affirming two consecutive five-year sentences).

Circuits.[6] They either fail to consider the ambiguity of "conviction," however, or presume that it has only one particular meaning. Indeed, in its seminal decision on section 924(c), the Eleventh Circuit Court of Appeals found the meaning of "second or subsequent conviction" unambiguous, but did not inquire into the multiple meanings of "conviction." *See United States v. Rawlings*, 821 F.2d 1543, 1545-46 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987).

Following *Rawlings* and other circuits, the Fourth Circuit, in *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991), reasoned that the application of the enhancement "does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first

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[6] *See, e.g., Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6; *Livingston*, 941 F.2d at 435-36; *Bennett*, 908 F.2d at 194; *Nabors*, 901 F.2d at 1358; *Foote*, 898 F.2d at 668.

conviction before the enhancement can apply to the second, or that the defendant have served the sentence imposed on the first." *Id.* at 193. In so reasoning, the court incorrectly presumed that "conviction" is unambiguous and means only a finding of guilt prior to the entry of judgment. Similarly, the Second Circuit Court of Appeals focused on the disjunctive "or" and reasoned that "second" and "subsequent" must be construed as having different meanings. *United States v. Bernier*, 954 F.2d 818, 819 (2d Cir. 1992).[7] Finding this construction persuasive, the court held that the "plain language of the statute . . . means that the enhanced 20 year penalty must be imposed notwithstanding the simultaneity of the second conviction." *Id.* Focusing on the disjunctive, however, simply ignores the problem of the ambiguity of "conviction."[8]

D. Summary

In sum, the language of section 924(c)(1) "is, at best, hard to follow in simple English." *United States v. Nabors*, 901 F.2d 1351, 1358 (6th Cir.), *cert. denied*, 111 S. Ct. 192 (1990). Whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time" is unclear. The fact that persons possessed

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[7] Nevertheless, even *Bernier* found it "conceivable that the word 'subsequent' is used as a synonym for the word 'second' in section 924(c)." *See* 954 F.2d at 819.

[8] The most recent case that disregards the ambiguity of "conviction" is *United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6 (9th Cir. Oct. 5, 1992).

of reasonable minds can "find directly opposite 'plain meanings' in this statute, suggests at a minimum that the phrase 'second or subsequent conviction' is ambiguous as applied to simultaneous convictions of separate counts in an indictment." *United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *9 - *10 (9th Cir. Oct. 5, 1992) (Fletcher, J., dissenting). Because "second or subsequent conviction" is ambiguous, the Court must look to the legislative history to ascertain whether the ambiguity can be explained or elucidated. *See R.L.C.*, 112 S. Ct. at 1334; *see also Chapman*, 111 S. Ct. at 1926; *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

II. THE LEGISLATIVE HISTORY OF THE STATUTE DOES NOT RESOLVE THE AMBIGUITY OF "SECOND OR SUBSEQUENT CONVICTION."

A. The Legislative History Provides Little Elucidation.

Section 924(c) "was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff." *Simpson v. United States*, 435 U.S. 6, 13 (1978). The amendment passed on the same day it was offered. *See Busic v. United States*, 446 U.S. 398, 405 (1980). As the Court noted in *Busic v. United States*, moreover, "the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in

the sparse pages of floor debate that make up the relevant legislative history." *Id.; see* 114 Cong. Rec. 22,229-48, 27,141-44 (1968).[9]

A reading of the congressional debates reveals, as this Court has recognized, that the "overriding purpose of 924(c) was to combat the increasing use of *guns* in the commission of federal felonies." *Simpson*, 435 U.S. at 10 n.4 (emphasis in original). The debate in the House of Representatives does not provide any detailed analysis of the use of the words "second" and "subsequent."[10] The focus of the House debate was on enacting legislation that would require "stiff mandatory sentences" and would address repeated offenses "committed by those who are out on parole and out on bond." 114 Cong. Rec.

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[9] The full text of the passages quoted from the floor debate is set out in the Appendix to this Brief at B-1. Subsequent to the Poff amendment, Pub. L. No. 90-618, Title I, § 102, 82 Stat. 1223 (Oct. 22, 1968), Congress lowered the minimum punishment for a second or subsequent conviction from five years to two years and prohibited courts from imposing concurrent sentences. *See* Pub. L. No. 91-644, Title II, § 13, 84 Stat. 1889, 1890 (Jan. 2, 1971). In 1984, Congress increased the minimum levels of punishment from one year to five years for the first conviction, and from two years to ten years for the second or subsequent conviction under this section, and it also prohibited parole. *See* Pub. L. No. 98-473, Title II, Part D § 1005, 98 Stat. 2138, 2139 (Oct. 12, 1984). In 1986, Congress increased the punishment for crimes involving machine guns and silencers. *See* Pub. L. No. 990-308, § 104(a)(2), 100 Stat. 456, 457 (May 19, 1986). Since 1988, Congress twice has increased the ranges of punishment. *See* Pub. L. No. 100-690, § 6460, 102 Stat. 4373, 4374 (Nov. 18, 1988); *see also* Pub. L. No. 101-647, § 1101, 104 Stat. 4829 (Nov. 29, 1990).

[10] The Senate amendment uses only the term "subsequent." *See* 114 Cong. Rec. 27,142 (1968).

22,230 (statement of Rep. Casey). As stated by Representative Casey, offenders "seldom get in there long enough for the psychologist and the penologist to shake hands with them before they are out again." *Id.* The general purpose of this section was to "provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission." *Id.* at 22,234 (statement of Rep. Harsha). Throughout the debate, the discussion emphasized mandatory sentences that could not be suspended. *See, e.g., id.* at 22,230-31, 22,237.

As reflected in the words of Representative Poff, the sponsor of section 924(c), the enhanced penalty was provided so that repeat offenders would receive stronger punishment than they did the first time they served a sentence of imprisonment: "Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time." *Id.* at 22,231.[11] Representative Rogers supported Representative Poff's amendment on the ground "that any person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." *Id.* at 22,237. At best, these statements

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[11] Because Representative Poff was the sponsor of this provision, his comments are entitled to weight. *See Simpson*, 435 U.S. at 13; *see also S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972) (noting that the Court has been extremely wary of floor debates "save for precise analyses of statutory phrases by the sponsors of the proposed laws").

support the Petitioner's position that "second or subsequent conviction" does not cover multiple violations of section 924(c) alleged in one indictment.[12] At worst, these statements are equivocal.[13] As concluded in *United States v. Abreu*, 962 F.2d 1447 (10th Cir. 1992) (en banc), therefore, these isolated statements do "not compel a particular interpretation of 'second or subsequent *conviction*' " and "could support either of two equally plausible meanings." *Id.* at 1450 (emphasis in original).

B. The Inquiry Is Not Advanced by Reliance on the General Desire of Congress.

Although the Eleventh Circuit Court of Appeals, in *United States v. Rawlings*, 821 F.2d 1543, 1546 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987), relied on the statements of Representatives Poff and Rogers in concluding that congressional intent was consistent with the "clear language of § 924(c)," *id.* at 1547, as noted previously, it failed to address the ambiguity of "conviction." *See* discussion *supra* part I.B. By buttressing this conclusion with Congress's general "intent to punish severely those who

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[12] *See also* 114 Cong. Rec. 22,238 (statement of Rep. Whitten). Representative Whitten apparently construed section 924(c) to require a conviction on the underlying violent felony and an appeal upholding the conviction "before you can convict the accused of so using a gun." *Id.*

[13] Apparently, Representative Poff conceived of each prosecution as involving only one underlying felony and one firearm offense. *See* 114 Cong. Rec. 22,232 (responding to Rep. Ichord). This conception of the prosecutorial unit supports the construction of "in the case of his" as meaning "in the legal case of." *See supra* note 4.

use firearms during crimes of violence," *id.* at 1546, it also failed to abide by the teachings of this Court on construing precisely the scope of section 924(c):

> In addition . . . , the Government contends that our reading of the legislative materials is unreasonable because those who supported the Poff amendment . . . were clearly committed to meting out stiff penalties for use of a firearm in the course of a felony . . . . The argument is overdrawn. . . . As we understand it, the Government's argument is . . . that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt . . . . Thus, while Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by asserting that Congress wanted no boundaries.

Busic, 446 U.S. at 408.[14] Thus, the Tenth Circuit's interpretation surpasses the Eleventh Circuit's because it

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[14] The Eleventh Circuit also relied on the policy of judicial economy: "[A] prosecutor could simply bring the two offenses in two separate indictments, thereby insuring that one of the convictions would occur later in time than the other. Such manipulation of the court system would add to the court's caseload and serve no useful purpose." *Rawlings*, 821 F.2d at 1546. This reasoning, however, turns the question at issue on its head. The legal question, first, is whether the text of the statute and the legislative history are unclear, and if so, whether the rule of lenity applies. If the rule of lenity applies and the twenty-year enhancement cannot be imposed in this case or similar cases, the question *then* is whether a prosecutor, in his discretion, could attempt to avoid the dictates of the rule by simply bringing two offenses in two separate indictments. Nevertheless, those facts and that hypothetical question are not before the Court in this case. *See Thorpe v. Housing Authority of*

reads the legislative history in light of the entire provision in question, and it does so in accordance with the prior dictates of this Court.

C. Related Statutes, If Relevant, Show the Intent of Congress to Enhance Penalties on the Basis of Prior Convictions.

Although the legislative history demonstrates that section 924(c) was intended to target recidivists who use firearms, it does not resolve the ambiguous scope of "second or subsequent conviction." Ordinarily, a review of other federal, recidivist statutes might assist the inquiry. *See, e.g., Dickerson*, 460 U.S. at 115. In this case, however, it sheds little light on the language of section 924(c) because of "the haste in this legislation" and the "considerable confusion as to the meanings of words" when it was offered and passed. 114 Cong. Rec. 22,243 (statement of Rep. Hunt, supporting the Casey amendment).

Nevertheless, various federal statutes are consistent with the construction that section 924(c)'s twenty-year enhancement was intended to apply to an offender who has a *prior* conviction under that section. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A), (B) (1988) ("after a prior conviction . . . has become final," and "after one or more prior

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Durham, 393 U.S. 268, 284 (1969). In addition, economy and efficient management should not be permitted to displace the careful administration of justice. *Cf. Taylor v. United States*, 493 U.S. 906, 907 (1989) (Stevens, J., respecting the denial of the petition for writ of certiorari).

convictions"); 21 U.S.C. § 844(a) ("after a prior conviction"); 21 U.S.C. § 860(b) (1988) ("after a prior conviction"); *see also Abreu*, 962 F.2d at 1451-52 (discussing other such recidivist statutes). The United States Sentencing Guidelines also embody the concept that a recidivist or "career offender" is an offender who committed "the instant offense subsequent to sustaining at least two prior felony convictions." U.S.S.G. § 4B1.2(3) (1992); *see also* 18 U.S.C. § 994(h)(2). Construing "second or subsequent conviction" to mean a prior conviction under the statute, moreover, is consistent with the general policy underlying a recidivist statute, which is to increase the punishment for a subsequent offense when the prior punishment has not reformed the offender. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 278, 284 (1980); *Moore v. Missouri*, 159 U.S. 673, 677 (1895).[15]

D. Summary.

In sum, the legislative history of section 924(c) does not explain or elucidate the ambiguity of "second or subsequent conviction," *see R.L.C.*, 112 S. Ct. at 1334, and "a reasonable doubt persists about [the] statute's intended scope even *after* resort to 'the language and

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[15] The general policy underlying recidivist statutes and the language of related federal, recidivist statutes weigh against an interpretation of section 924(c) that would allow a prosecutor to bring two separate firearm charges in two indictments in order to obtain the twenty-year enhancement. The hypothetical question about the propriety or constitutionality of such a manipulation, however, is not before the Court in this case. *See supra* note 14.

structure, legislative history, and motivating policies' of the statute." *Moskal*, 111 S. Ct. at 465 (quoting *Bifulco*, 447 U.S. at 387) (emphasis in original).

III. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY NOT APPLYING THE RULE OF LENITY TO "SECOND OR SUBSEQUENT CONVICTION."

A. The Rule of Lenity Is Rooted in Fundamental Principles of Due Process.

When ambiguity survives an examination of the statutory text and legislative history, the Court chooses "the construction yielding the shorter sentence by resting on the venerable rule of lenity." *R.L.C.*, 112 S. Ct. at 1338; *see also Moskal*, 111 S. Ct. at 465; *United States v. Bass*, 404 U.S. 336, 347-48 (1972); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958). This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178, *quoted in Bifulco*, 447 U.S. at 387; *see also Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980). If a statutory interpretation produces a result "so 'absurd or glaringly unjust,' " as to lead the Court to question what Congress actually intended, *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells v. United States*, 287 U.S. 435, 450 (1932)), the rule of lenity also may be applied. *Cf. Chapman*, 111 S. Ct. at 1926-27.

"Engrained in our concept of due process is the requirement of notice." *Lambert v. California*, 355 U.S. 225, 228 (1957). The Court's "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction," but rather "is rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979). The rule of lenity is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon " 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' " *Bass*, 404 U.S. at 348 (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks* 196, 209 (1967)), *quoted in R.L.C.*, 112 S. Ct. at 1338.

B. The Petitioner's Due Process Rights Were Violated Because the Lower Courts Failed to Apply the Rule of Lenity.

The district court sentenced the Petitioner to serve five years in federal prison for one violation of section 924(c) and an additional 100 years in federal prison for the other five violations of section 924(c), even though the violations were alleged in one indictment. (J.A. 28-30). The district court and the court of appeals ruled that the additional five violations each counted as a "second or subsequent conviction." (J.A. 26, 34). Because neither the text of the statute nor its legislative history clarifies whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time," the lower courts should have applied the rule of lenity,

and they violated the Petitioner's due process rights by failing to do so.

The underlying principles of the rule and of due process beg for the application of the rule of lenity to the Petitioner, for the statute did not give fair warning that he would receive 105 years in prison the first time he ever was haled into court for any violation of section 924(c). Neither he nor any defendant should languish in prison for his natural life unless Congress has clearly said he should. The result of a 105-year sentence of imprisonment, upon the Petitioner's first appearance in court for any violation of section 924(c), is so glaringly unjust that the Court cannot but question whether Congress intended such an application of the phrase, "in the case of his second or subsequent conviction."

C. Summary.

Because the rule of lenity applies in this case, the Court must choose the construction yielding the shorter sentence. *R.L.C.*, 112 S. Ct. at 1338. Thus, the Court should hold that "second or subsequent conviction" means "an additional judgment of conviction entered later in time." If this construction clashes with present legislative expectations, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case." *Bifulco*, 447 U.S. at 400-01.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

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APPENDIX A

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Title 18, United States Code, Section 924(c) (1988)

§ 924. Penalties

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

APPENDIX B

APPENDIX B

EXCERPTS OF FLOOR DEBATE

HOUSE OF REPRESENTATIVES

114 Cong. Rec. 22,229-48 (1968)
(Comments containing quotations found in the Petitioner's Brief)

Statement of Representative Casey - 114 Cong. Rec. 22,230

MR. CASEY. If I may first finish my statement, then I will be glad to yield to the gentlewoman.

Mr. Chairman, they said that this amendment providing for mandatory sentences is too stiff and that it is too harsh. But let me tell you, your people back home do not think it is too harsh. I could have brought a whole wheelbarrow full of mail here, and not just from my district, but from all over this country expressing support for these stiff mandatory sentences.

Here is an Ohio paper which took a poll and of those they have counted so far, there are 705 to 22 who are in favor of stiff mandatory sentences. They want action.

The judge still has some discretion with reference to that. He can, if he wants to do it, suspend the sentence or a portion of it. He can give more than this – this is a minimum if he thinks it is justified. Mind, you, the Justice Department is not compelled to file charges – just as they have failed to file them under some of the existing statutes that we now have with regard to gun use.

Would it increase the Federal police force? I cannot see that it would. I cannot see that it would do that at all.

Primarily, these are State cases – the State police would most likely and practically 99.91 percent of the time make the charge on the offense. Then if an individual is convicted, that person would be eligible to this punishment for the use of a firearm in the commission of that offense.

If they are innocent, no case would lie under this amendment. Would we need more courts? I do not think so. Would we need more prisons? Let me tell you this. We are not using all the cells we have. The great call about rehabilitation and about a kinder attitude toward the criminal has meant that we have had 20,000 fewer prisoners in our State and Federal prisons from 1961 to 1966, a great reduction.

And what was happening while you were doing that? Offenses increased by one million from 1961 to 1966. The cost of law enforcement went up by $1 billion.

They are going to tell you that you ought to restrict this just to Federal offenses. You are going to cut the heart out of it. You can go back home, if you want to, and tell your constituents that what is left would apply to Federal offenses. In other words, cut out 99.99 of the criminals from under this sentencing and this punishment, because you only had in the first 9 months of this year 1693 cases which would qualify as Federal offenses as far as robbery, murder, and aggravated assault are concerned.

They are going to tell you, "The penologists say that this is bad." I told you the other day that right now they seldom get in there long enough for the psychologist and the penologist to shake hands with them before they are out again.

They will tell you that these are misguided children. I tell you I think the crooks are smarter than the penologists and the so-called rehabilitation experts, because most of the major crimes are committed by repeating offenders. The offenses are committed by those who are out on parole and out on bond.

The people of this country want action out of this Congress. They are looking to this Congress. This bill has nothing in it that I can see which is going to deter the criminal or punish him. What you have here is aimed at what the so-called experts want, which is to try to remove guns from the hands, as much as possible, of the citizens. That is what it is. It is the honest, law-abiding citizens who will abide by this law if you pass it. But let us have some penalties in here. Let us say one word, ladies and gentlemen, about the crook.

I yield to the gentlewoman from Oregon.

Statement of Representative Poff
114 Cong. Rec. 22,231-32

Mr. POFF. Mr. Chairman, my amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment.

My substitute makes it a separate Federal crime to use a firearm in the commission of another Federal crime and invokes separate and supplemental penalties. For the first offense, the penalty is a minimum of 1 year and a

maximum of 10 years. For the second offense, the penalty is a mimimum of 5 years and a maximum of 25 years. It will be said that the penalty structure in my substitute is less than that in the Casey amendment. While it is true that the minimum penalties are smaller, the substitute is not weaker. Indeed, the substitute is stronger. The substitute provides that the penalties cannot be suspended and that probation cannot be granted. The Casey amendment contains no such provision.

My substitute is also stronger in that it compels the court to impose the sentence to run consecutively upon the penalty previously imposed for the basic crime. The Casey amendment permits the court to make the two penalties run concurrently and to suspend any part or all of either or both.

It will also be argued in opposition to both the Casey amendment and my substitute that the minimum mandatory penalty is often counterproductive. Ordinarily, this is true for two reasons. First, when the prosecuting attorney feels that the minimum penalty is greater that the gravity of the offense in a particular case, he simply indicts for a lesser included offense or abandons prosecution altogether. If the accused is indicted and the jury feel that extenuating circumstances make the minimum penalty too harsh, they search diligently for reasonable doubt and acquit. In this particular context, however, the argument is not quite so valid. The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail.

He should further understand that if he does so a second time, he is going to jail for a longer time.

The Casey amendment applies to both Federal felonies and State felonies. My substitute is confined to Federal felonies. This is for three reasons.

First, I do not want to put upon the Federal prosecutor the evidentiary burden of proving that the firearm moved in interstate commerce in order to establish Federal jurisdiction in each individual case. Every Federal felony defined in the code already has its own jurisdictional base.

Second, if State felonies are included, the caseload cast upon the Federal investigative and prosecutive apparatus would be unmanageable. Last year, State cases in which guns were used included 71,000 robberies, 55,000 aggravated assaults, and 7,700 homicides. If only a fraction of these were prosecuted under the Casey amendment, civil cases on the already crowded dockets of the 93 U.S. district courts would never be heard.

Third, as a matter of policy, I do not think it would be wise to convert State crimes into Federal crimes on such a massive scale. The Constitution reserves the police powers to the several States. What is at issue is the proper function of the federal system. What is at stake is the concept of dual sovereignties. What is involved is the danger of centralized police powers.

This new Federal crime we are creating should remain within its own boundaries and not trespass upon the domain of the States.

For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.

Mr. PUCINSKI. Mr. Chairman, will the gentleman yield?

Mr. POFF. I yield to the gentleman from Illinois.

Statement of Representative Poff
114 Cong. Rec. 22,232

Mr. POFF. First of all, I thank the distinguished gentleman for his support of my amendment and second may I commend him for the knowledge and insight which he has displayed with reference to this problem.

The answer to his question is in the affirmative; namely, it would be expected that the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow.

Statement of Representative Harsha
114 Cong. Rec. 22,234-35

Mr. HARSHA. Mr. Chairman, I rise to commend the gentleman from Virginia.

Mr. Chairman, I rise in support of the substitute amendment offered by the gentleman from Virginia. I had a similar substitute prepared to offer, but the Chair recognized the gentleman from Virginia first and this is certainly as it should be, because the gentleman from Virginia is a member of the Judiciary Committee which is handling this bill, and, according to the rules of the House, members of the committee handling the legislation should have priority in matters of this kind, and I certainly agree with this procedure.

The gentleman from Virginia is attempting to do what I have attempted to do in my amendment and in my proposed bill which I introduced dealing with this matter of crime and the use of firearms. The emphasis should be, and we are in agreement, on the user of the weapon, rather than the weapon itself. Certainly, if we are going to vigorously combat this problem of crime, we are going to have to have not only stricter measures dealing with the subject, but we are also going to have to require a vigorous prosecution of those measures and incarceration of the guilty, so as to provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission.

For too long now the emphasis, by judicial interpretation, has been placed on the "rights" of the criminal to the neglect of his responsibility as a member of society and to the neglect of the rights and privileges of the law-abiding citizen. Courts in many cases have been too promiscuous in their use of probation and too lenient in their exercise of judicial discretion and suspension of criminal penalties.

As I previously said, I had introduced a companion measure to the so-called Casey amendment, and yet while I strongly believe that his amendment is a step in the right direction, I am quick to realize that there are some problems with the provision that requires those merely having a gun in their possession to be subject to the same penalties as those who actually use that weapon in the commission of a crime. On the other hand, the situation is so abnormal and of such paramount interest to the welfare and security of our law-abiding citizens, I feel that we have to adopt stringent measures to remedy the situation. While I can see that the substitute of the gentleman from Virginia is a perfecting amendment and eliminates the possibility of probation or suspension of the mandatory minimum sentence for both first and second offenses, I regret that his substitute only covers the violation of Federal crimes. Unfortunately, this does not cover the bulk of crimes because most of them are violations of State laws. Hopefully, State legislatures will take the necessary action to cover these problems. Admittedly, police protection and law enforcement is a local matter, yet because of the gravity of the situation and its national scope, I think the Federal Government has a proper role to play in dealing with the problem.

Mr. Chairman, rather than to control guns, I think that the solution to this problem is to control crime. The criminal always finds a way to obtain a weapon and I fear that by legislation dealing with weapons, if we are not exceedingly careful, we may be providing the criminal with additional advantages over the law-abiding citizen and, rather than restricting the use and possession of

weapons by criminals, we may wind up by prohibiting the lawful use of weapons by the law-abiding citizen.

Mr. Chairman, while my amendment is more restrictive and imposes more severe penalties than the amendment of the gentleman from Virginia, his is a much needed step in the right direction and I can certainly wholeheartedly support it. I would urge my colleagues to adopt this amendment so that if we are to have legislation dealing further with the use of guns, we can make that legislation meaningful and effective by placing the burden upon the criminal rather than on the law-abiding citizen.

Statement of Representative Rogers
114 Cong. Rec. 22,237

Mr. ROGERS of Florida. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I want to say that the proposal of the gentleman from Virginia [Mr. POFF] is I believe a realistic amendment. I personally have felt that we should put a minimum penalty of 5 years for any crime in which a gun was used which penalty could not be suspended, and no probation granted by the judge.

On July 2 I introduced a bill, H.R. 18287, which would provide an additional 5 years imprisonment where a firearm was used in the attempted commission or commission of certain Federal crimes such as homicide, robbery and burglary assault, kidnaping, and others.

In addition, my bill provides that the 5-year penalty which would be assessed could not be suspended, nor could probation or parole be granted.

I am particularly concerned over the lack of proper penalties being imposed by the courts right here in the District of Columbia.

I examined the sentences imposed by the U.S. District Court in and for the District of Columbia during 2 weeks in June of this year.

Of 17 crimes committed with the use of a gun, six of the criminals involved received suspended sentences.

Well, it does no good to put a heavy penalty on a crime that may be assessed but that is never assessed. What we need to do, I believe, is follow the philosophy that we are stating in the Poff amendment which follows the principle set out in my bill. I support very vigorously, this amendment which would at least put a minimum sentence that may not be suspended and no probation granted by a judge, so that any person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty.

Because it does no good to say, well, we will have a 25-year jail penalty for any crime if the penalty is never used – or is suspended.

In other words, Mr. Chairman, we have to have a penalty that a person knows he will experience with certainty.

So, Mr. Chairman, I believe the philosophy is correct, and I would hope that the Poff amendment is adopted.

Statement of Representative Whitten
114 Cong. Rec. 22,238-39

Mr. WHITTEN. Mr. Chairman, I move to strike out the last word.

Mr. CHAIRMAN, I take this time to point out the fact that many people throughout the Nation have been led or misled into believing that some gun control law would prevent crime or cause a return of law and order. I do not think there is any question but that most people can see that law enforcement and law and order have broken down. They want something done. Something must be done to return to law enforcement, where the criminal can be sure of being arrested, tried, convicted and punished, for that is the real deterrent to crime.

To provide by law for the Federal registration of guns will not get the job done, or even to require that all guns be turned in to the Government would not accomplish what we need, for the good citizen would register or even turn his gun in; but the outlaw, or the crowd which is committing these crimes of murder, assault, robbery and riots would never do so – leaving the law-abiding citizen even more at their mercy.

The trouble is the Supreme Court and other courts bound by it have broken down law enforcement, and we will never get a return to law and order until we go after the Court.

I am not sure of the total number, but reputable people have counted the Supreme Court and other Federal court decisions and find that in 30 or more cases,

newly found Court-created rights of the individual criminal have been put ahead of the welfare of the general public.

Others who have counted their decisions have pointed out that in 10 cases they have more and more restricted or tied the hands of the policeman or the law enforcement officer, making it next to impossible to obtain evidence which the Court will permit to be used, to make a case against a law violator.

Now if the Supreme Court through these decisions will not let convictions stand for murder, rape, robbery, and all the rest, what makes you think that there will be any punishment imposed for committing such crime with a gun? After all, as I have pointed out, if you could convict him and punish him for the crime, which would be a condition precedent for the gun punishment, we would have the crimewave broken anyway.

The gentleman from Florida [Mr. PEPPER] offered his resolution to set up a Joint Committee on Crime the other day. It was adopted by the House. At that time I asked him if he planned to review the decisions of the Supreme Court and the other courts which were bound thereby, as well as the action or nonaction of the Department of Justice and the part they had played in effect causing the wave of unbridled crime. First he said yes, then later retracted and said his bill "authorized" such investigation.

Let me point out a few things to you here. Any bill you pass or any amendment you pass here today, for instance, will not be self-enforcing. As was pointed out a

moment ago, the amendment now pending provides penalties for using a gun in committing a crime. Think about that a minute; you will note that before you can convict the accused of so using a gun you must first convict him of the robbery or murder, or the crime he is charged with committing "with a gun" as the case may be, and have the conviction upheld. If we could count on that, that is, conviction and punishment for robbery or murder, riots, et cetera, we would break up the crime wave anyway, or really we would not now have such a wave of crime.

For proper law enforcement or to prevent crimes from occurring, to protect the public, several things are required – good officers, good jurors, and good judges so that arrest, trial, conviction and punishment will be certain.

What chance does the public have when the Supreme Court makes it next to impossible for the policeman to arrest or to obtain evidence which the courts will let the prosecutor use, and makes jury service for the irresponsible citizen a matter of right. Those of us with trial experience know that it takes more than average courage for a juror to bring in a verdict of guilty that will send someone to jail or to the penitentiary. Many good people are too softhearted for such duty.

My friend, Congressman CELLER, and his Committee on the Judiciary, not too long ago, passed a bill which made it a right, not a privilege, for almost any person who is breathing and 21 years old to serve on a jury. What chance has a prosecutor got to protect the people before a jury of irresponsible persons?

Our Committee on the Judiciary needs to go to work on the law of evidence and on the actions of the Federal courts which have tied the hands of the police, of the prosecutor, and of the trial courts. They put the rights of the criminal, newly found by this Supreme Court, ahead of the public interest.

I have the highest regard for my friend from Virginia [Mr. POFF]. In his substitute, he makes the penalty for committing a crime mandatory. What is he really trying to reach? He is trying to reach the judges who are turning these people loose and fix it so they can no longer turn the guilty loose on a defenseless public.

Those of you who have had experience in criminal cases also know that if you get your penalty too severe, you increase your chances of a sympathetic jury failing to convict. We must recognize that it is the Supreme Court of the United States claiming to itself rights that no court before this one ever claimed, admittedly releasing people who are guilty on technicalities which Judges of the present Supreme Court claim to have found in the Constitution.

If your court is not going to let the policeman legally arrest, or the prosecutor use the evidence, and if this Committee and the Congress will not let you have a stout, stronghearted jury, if you cannot convict a man for the murder, rape, or robbery that he commits, what could you do about punishing him for committing a crime with a gun when you failed to convict him of the crime itself.

Mr. Chairman, the public is being misled, unknowingly, perhaps, by this bill.

Mr. Chairman, I would like to read an editorial from the Mobile, Ala., Register, containing quotes from remarks I made to this House in August 1966. I quote:

TIME TO WAKE UP AND QUIT FIDDLING

Some things said in Congress the other day by Representative JAMIE L. WHITTEN of Mississippi were remindful of that familiar phrase about fiddling while Rome burns.

"The American people," he said, "have had enough of trials being delayed, the guilty going free on technicalities, property being destroyed, our police being pushed around.

"They have a right to expect us to do something to restore law and order, for involved is the destruction of responsible government.

"Here we are with the greatest wave of lawlessness facing our country all across the land, and yet the Congress, which should take to heart its own responsibility, is busy spending days and days protecting the rights of the irresponsible to serve on juries. Now, is that not a ridiculous thing for us to do, when we should be busy trying to make punishment for crime more certain?"

Mr. WHITTEN, continuing to emphasize the problem of lawlessness in the face of inadequate effort to stamp it out, told his colleagues:

"We find in today's newspaper reports from at least eight or 10 states throughout the nation where on yesterday criminals were running wild, destroying lives and property.

"We see on every hand the court's getting away from the rule on which orderly government was built, a general rule to the effect that if the record clearly showed the

guilt of the defendant beyond a reasonable doubt, he or she would not be released on the public on some technicality and particularly a technicality raised by the appellate or Supreme Court itself.

" . . . It is said that Nero fiddled while Rome burned. It strikes me that is about what we are doing here.

"At a time when our country is becoming the victim of the criminal, when our wives and daughters and we ourselves are afraid to walk our streets, we find the Congress spending these hours and days trying to protect the rights of irresponsible persons to sit on a jury. . . .

"We need to do something about crime and criminals. We need to make punishment more certain. We need to put the rights of an orderly and lawabiding society ahead of the whims of the Supreme Court. . . .

"It is time to wake up here and quit fiddling. Rome is certainly burning, and if you do not believe it, read today's newspapers."

There is a glaring misfortune in regard to remarks such as Mr. WHITTEN made in Congress in this instance. The misfortune is remarks of this kind are not made by enough members of Congress and enough other Americans.

But no American with his eyes open should fail to see that it is time to wake up and quit fiddling.

As a postscript to Mr. WHITTEN's remarks, we call attention to this excerpt from a Chicago dispatch at weekend by United Press International:

"Hoodlums broke windows in a suburban department store and stole 24 rifles and shotguns from displays after a rampage of violence during which a policeman was shot by a sniper."

More proof that the time has come in the United States to wake up and quit fiddling. Not only is it time to wake up and quit fiddling – the need for that is acute, urgent, imperative. The longer the delay, the greater and more alarming the danger.

Why the delay – why the reluctance to take urgently needed action with courage, forthrightness and resolution? Two prime factors in why this action is not taken are: Stupidity and politics. The American people cannot afford the brands of stupidity and politics that leave them exposed to the violence and crime of the lawless.

Mr. Chairman, conditions are terrible. We must take action. However, we will never solve this problem by making it a crime to use a gun to commit a murder, when we cannot convict the accused of the murder itself.

We will never solve this problem by making it possible for the wrong kind of officials to call in the guns of law-abiding citizens when they know and you and I know they cannot get the guns of outlaws.

There is only one way to save this country of ours; and that is for the Attorney General, the Department of Justice, and the Federal courts to back up local law-enforcement officers, instead of nullifying their efforts. If some change is not soon made, you will have no policemen; for no one would have the job. Conditions will border on those of the Middle Ages, where it was every man for himself – and there was little for anyone.

Our Committee on Judiciary needs to give its attention to these facts – the present age may not be as dark as the Dark Ages, but it is rapidly headed in that direction.

Statement of Representative Hunt
114 Cong. Rec. 22,243-44

Mr. HUNT. Mr. Chairman, I move to strike out the last word.

Mr. Chairman, much has been said here today about the haste in this legislation. There is considerable confusion as to the meanings of words and as to the jurisdiction of the court.

I would like to point out to this body that the crux of the matter we are trying to get at today insofar as this particular phase is concerned was best explained by the gentleman from Ohio [Mr. LATTA].

It is a well known fact, regardless of what the preceding speaker said, that strong deterrent action has been the greatest cure for crime.

It cannot be disputed in any way, if you go back and look at the analysis of crimes, that tough judges and strong sentences have always been a deterrent to crime.

I am not one of those who would give them a pat on the wrist for using a gun in the commission of a crime.

Where I come from, we give people 30 days to 1 year for being disorderly. Anyone who carries a gun in the commission of a crime is not there for the purpose of attending Sunday school. He is not that helium-headed person who gets a little bit drunk on Saturday night and gets the same penalty. He is the man who goes out taking a gun to commit a crime whereby he might take another person's life, if he panics or is the hardened criminal type without conscience.

Today we are trying to find a remedy for crime in these United States regardless of creed, color, or anything else.

I say to the gentleman from Alaska who is going to offer an amendment that 5 years is and should be the minimum mandatory sentence where a gun is used to commit a crime.

I am going to support the Casey amendment. I believe what the gentleman from Ohio [Mr. LATTA] has said today makes sense.

I simply say to you ladies and gentlemen in this Chamber – Do not lose the sight of the fact that in some cases amendments that have been proposed here today are inadequate. The atrocious murder of Senator Kennedy in California would not be covered by the terms of certain amendments that have been offered here today. We seek to correct the repetition of that murder by appropriate punishment for anyone who so conspires.

We are simply trying to stamp out crime. We are not here to conduct a Sunday school class, and we are not here to give them a sentence whereby they can stand on their head for one year and get out. It is a fact also that one-third of the policemen in this country who were killed by gunmen last year were killed by men who were on parole.

Mr. Chairman, I say to you that this is the time to stand fast and to enact a strong law to deter crime in the United States, or else quit and go home.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS LEE DEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for a "second or subsequent conviction."

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OPINION BELOW

The opinion of the court of appeals (J.A. 31-34) is reported at 954 F.2d 262.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. The petition for a writ of certiorari was filed on May 7, 1992, and was granted

on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 924(c)(1) (Supp. II 1990) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on six counts of bank robbery (Counts 1, 3, 5, 7, 9, and 11), in violation of 18 U.S.C. 2113(a) and (d); six counts of using a firearm in relation to a crime of violence (Counts 2, 4, 6, 8, 10, and 12), in violation of 18 U.S.C. 924(c); and one count of possessing a firearm as a previously convicted felon (Count 13), in violation of 18 U.S.C. 922(g). J.A. 28. Petitioner was sentenced to concurrent terms of 14 years' imprisonment on each of the bank robbery counts and to a concurrent term of 10 years' imprisonment on the felon-in-possession count. J.A. 29. Those sentences were followed by a consecutive term of five years' imprisonment on the Section 924(c) charge in Count 2 and by additional consecutive terms of 20 years' imprisonment on each of the Section 924(c) charges in Counts 4, 6, 8, 10 and 12. J.A. 29-30. In all, petitioner was sentenced to 105 years' imprisonment on the Section 924(c) counts, for a total sentence of 119 years' imprisonment. The court of appeals affirmed. J.A. 31-34.

1. The evidence at trial showed that petitioner, who had previously been convicted of five armed bank robberies and was then on parole,[1] committed six bank

[1] Petitioner pleaded guilty on February 20, 1976, to federal charges arising from his commission of five armed bank robberies between January 1973 and September 1975. See Presentence Investigation Report 15-17. Petitioner received a cumulative sentence of 30 years' imprisonment and was ultimately released on parole on December 8, 1989—approximately six weeks before the instant series of armed bank robberies commenced.

robberies in the Houston, Texas, area during a four-month period in early 1990. The offenses occurred at the Ameriway Bank on January 24 and February 23; at the Fountainview branch of the Charter National Bank on March 1; at the Galleria branch of the Charter National Bank on March 5; at the First Texas Bank on March 13; and again at the Fountainview branch of the Charter National Bank on April 12, 1990.

Petitioner's *modus operandi* was similar in each case. Wearing disguises that included a hat, a false mustache, and a wig, petitioner approached the bank tellers, opened his jacket to display a handgun, placed a duffel bag on the counter, and ordered the tellers to fill it. At trial, seven tellers identified petitioner as the armed man who had robbed them. I Tr. 21-22, 24, 46, 61-62, 64-65, 86, 102, 113-114, 126-127. In addition, petitioner made a statement to the police admitting his commission of each of the six charged robberies (II Tr. 58-61), and in a search of his residence, the police found proceeds from the robberies, disguise materials, and firearms. I Tr. 142-143; II Tr. 27, 50-52.

2. At sentencing, petitioner's counsel objected to the imposition of enhanced 20-year prison sentences as a result of petitioner's multiple convictions under 18 U.S.C. 924(c). J.A. 25-27. As counsel argued, "[t]he whole point" of Section 924(c)'s enhanced penalty provision was to "provide extra punishment for those who * * * did not learn their lesson from serving time the first time." J.A. 25-26. That purpose would be "defeated" in the present case, according to counsel, "[b]ecause [petitioner] never had an opportunity to serve the first sentence [for a Section

924(c) violation] by which he would be given an opportunity before being convicted a second time [and] receiving the enhanced punishment." J.A. 26.

The district court rejected petitioner's argument. As the court stated, "I have analyzed the enhancement statute as carefully as I can and it seems to me perfectly obvious what Congress is telling us is that we must consider each of these firearms offenses as separate offenses." J.A. 26. Thus, in addition to the Guidelines sentences totaling 14 years' imprisonment imposed as a result of petitioner's convictions on the bank robbery and unlawful possession counts, the court sentenced petitioner to a consecutive term of five years' imprisonment on his first Section 924(c) conviction and to consecutive terms of 20 years' imprisonment for the second and each subsequent Section 924(c) conviction. In so doing, the court noted that petitioner's recurring pattern of armed and dangerous criminal conduct made it "important not only that [petitioner] * * * [be] punish[ed] * * * but that [he] * * * [be] incapacitate[d]." J.A. 27.

3. The court of appeals affirmed. J.A. 31-34. The court noted that "the counts alleging violations of § 924(c)[] related to bank robberies committed on different days involving different banks and different times." J.A. 34. The court of appeals also noted that five courts of appeals that had previously considered the question had agreed that "a 'second or subsequent conviction' under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c)." J.A. 33. Adopting the same rule, the court of appeals concluded that "the District Court correctly imposed the proper sentence in this case, including the enhancements resulting from

'second or subsequent' convictions under 18 U.S.C. § 924(c)." J.A. 34.

SUMMARY OF ARGUMENT

By its terms, Section 924(c) requires a 20-year sentence for each violation of the statute, except for the first. Nothing in the statutory language or the relevant legislative history suggests that Congress intended to preclude application of that enhanced penalty provision when multiple violations of Section 924(c) are charged in the same indictment and the defendant is convicted in a single trial. Because the statutory language is plain, there is no occasion to apply the principles of lenity on which petitioner relies.

1. Section 924(c) provides that "[i]n the case of [a defendant's] second or subsequent conviction * * * [he] shall be sentenced to imprisonment for twenty years." Read in context, the word "conviction" refers to a finding of guilt by a court or jury, a reading that comports with the broad meaning this Court has given to the same term in related statutes. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983). The word "conviction" cannot mean a judgment of conviction, as petitioner contends, because such a judgment is entered only after sentence is passed, and a provision prescribing what sentence a defendant is to receive upon such a "conviction" makes no sense. Thus, giving the words "second" and "subsequent" their common and ordinary meanings, the phrase "second or subsequent conviction under this subsection" must be read—as eight courts of appeals have—to mean any finding of guilt under Section 924(c) other than the first such finding.

2. In light of the clarity of the statutory language, recourse to legislative history is unnecessary. In any event, the legislative history of Section 924(c) casts no doubt on the conclusion reached by the courts below and by the great majority of courts of appeals to consider the question. The 1968 debate indicates that the sponsor of the legislation and those who supported it believed that the enhanced penalties for "second or subsequent" convictions were necessary to deter those most likely to use firearms to commit crimes—*i.e.*, those persons who had done so once before. Indeed, it is apparent both from the debate surrounding the original enactment of Section 924(c) and from the debates and reports relating to subsequent amendments that Members of Congress understood the phrase "second or subsequent conviction" to refer simply to the commission of additional offenses that ultimately resulted in convictions. Congress's 1988 amendment of Section 924(c) to increase the penalties for "second or subsequent" convictions from 10 to 20 years' imprisonment is particularly damaging to petitioner, since it postdated the Eleventh Circuit's decision in *United States* v. *Rawlings*, 821 F.2d 1543, cert. denied, 484 U.S. 979 (1987), and was not accompanied by any statement casting doubt on the correctness of its holding. It is implausible to suggest that Congress believed it imperative to increase the punishments available for repeat offenders, but did so without an understanding of how those punishments were being meted out.

3. Petitioner can derive no help from the rule of lenity. This Court has repeatedly emphasized that the touchstone of lenity is "grievous ambiguity," such that even after invoking every aid to statutory

interpretation the Court is left with an ambiguous statute. The rule is not applicable merely because it is possible to articulate a construction of the statute that is narrower than that urged by the government. Nor is lenity appropriate solely because of the length of petitioner's total sentence. While petitioner's sentence is concededly severe, it is not disproportionate to his extraordinary course of violent crime. And the fact that petitioner was able to evade law enforcement and commit numerous felonies in the interim does not render his total sentence so glaringly unjust as to raise a reasonable doubt about Congress's intent.

ARGUMENT

SECTION 924(c)'S ENHANCEMENT PROVISION APPLIES WHENEVER A DEFENDANT IS CONVICTED FOR A "SECOND OR SUBSEQUENT" OFFENSE UNDER THE STATUTE, IRRESPECTIVE OF WHEN THOSE OFFENSES OCCUR OR WHETHER THOSE OFFENSES ARE TRIED IN A SINGLE INDICTMENT

Section 924(c) of Title 18 provides that a person who uses or carries a firearm during and in relation to a crime of violence or a drug trafficking crime shall be sentenced to imprisonment for five years. The statute further provides that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years." Those sentences may not be suspended, nor may they run "concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried."

The question in this case is whether the sentence enhancement provision applies only to "second or subsequent" convictions that occur after a judgment

of conviction has been entered on a prior offense. A divided Tenth Circuit, sitting en banc, has taken that restrictive view. See *United States* v. *Abreu*, 962 F.2d 1447 (1992), petition for cert. pending, No. 92-67. Petitioner agrees with the Tenth Circuit, arguing that because the phrase "second or subsequent conviction" has more than one possible meaning, the phrase is insolubly ambiguous and must be construed in favor of lenity. Eight courts of appeals, however, have concluded that the statutory language unambiguously requires the enhanced sentence for each violation of Section 924(c) committed after the first such offense, even when, as here, the multiple Section 924(c) violations are charged in the same indictment and the defendant is convicted in a single trial. See *United States* v. *Neal*, 976 F.2d 601 (9th Cir. 1992); *United States* v. *Bernier*, 954 F.2d 818, 820-821 (2d Cir. 1992), petition for cert. pending, No. 92-5025; *United States* v. *Raynor*, 939 F.2d 191, 193-194 (4th Cir. 1991); *United States* v. *Bennett*, 908 F.2d 189, 194 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); *United States* v. *Nabors*, 901 F.2d 1351, 1358-1359 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); *United States* v. *Foote*, 898 F.2d 659, 668 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); *United States* v. *Rawlings*, 821 F.2d 1543, 1546 (11th Cir.), cert. denied, 484 U.S. 979 (1987). For the reasons set forth below, the majority view is correct.

A. Congress Used Expansive And Unqualified Language In Requiring Enhanced Penalties For A "Second Or Subsequent Conviction"

1. This Court frequently has stated that in determining the meaning of a statute the inquiry must begin with the language chosen by Congress. *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990); *United*

States v. *Turkette*, 452 U.S. 576, 580 (1981). We submit that "[i]n this case it is also where the inquiry should end, for where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). Contrary to petitioner's argument, the plain meaning of the phrase "second or subsequent conviction under this subsection" requires the conclusion "that a conviction on a second firearms count, even though charged in the same indictment as the first, gives rise to the enhanced sentence." *United States* v. *Raynor*, 939 F.2d 191, 193 (4th Cir. 1991).

Petitioner rests his argument principally on the submission (Br. 11-15) that the word "conviction" has two meanings—"it can mean either the return of a jury verdict of guilt or the entry of a final judgment on that verdict." Pet. Br. 11. Petitioner concedes that no court save the Tenth Circuit has read the word "conviction" in Section 924(c) to mean the judgment entered upon the jury's verdict, but he argues that the other courts have erroneously failed to explore the various dictionary definitions of the word. Pet. Br. 12-13. Petitioner's argument, however, ignores the context in which the word "conviction" appears.

A statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (citations omitted); see also *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 924(c) provides that "[i]n the case of [a defendant's] second or subsequent conviction

* * * [he] shall be sentenced to imprisonment for twenty years." As used in the statute, the word "conviction" cannot mean a judgment of conviction, as petitioner contends, because such a judgment reflects not only the verdict but also the sentence. See Fed. R. Crim. P. 32(b)(1). When a judgment has been entered, the defendant has already been sentenced. A provision prescribing the sentence the defendant is to receive upon such a "conviction" makes no sense. The only possible meaning of the word "conviction" as used in Section 924(c), therefore, is the one that petitioner is at pains to discard—a finding of guilt by a court or jury. See *Webster's Third International Dictionary* 499 (1986) ("conviction" means "the act of proving, finding, or adjudging a person guilty of an offense or crime, * * * esp[ecially] by a jury and on which the judgment is based"). Indeed, that meaning is confirmed by Congress's use of the word "convicted" to mean "found guilty" in the immediately following sentence, which prohibits courts from placing on probation or suspending "the sentence of any person convicted of a violation of this subsection."

That conclusion is also confirmed by this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), which held that a defendant was "convicted" within the meaning of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 226, 18 U.S.C. 922(g)(1) and (h)(1), once his guilty plea was noted by a state court, even though no judgment of conviction was entered because of the State's deferred sentencing procedure. As the Court recognized in *Dickerson*, the language Congress used in that related statute was "sweeping": "No modifier

is present, * * * nothing suggests any restriction on the scope of the term 'convicted,' * * * [and] [n]othing on the face of the statute suggests a congressional intent to limit its coverage." *Dickerson*, 460 U.S. at 111, quoting *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Thus, although "the terms 'convicted' and 'conviction' do not have the same meaning in every federal statute," *Dickerson*, 460 U.S. at 112 n.6, the Court found "no reason whatsoever to suppose that Congress meant that term to apply only to one against whom a formal judgment has been entered" where "Congress' intent * * * was to keep firearms out of the hands of presumptively risky people." *Ibid.* Because the provision considered by the Court in *Dickerson* was re-enacted as part of the Gun Control Act of 1968, of which Section 924(c) was a part, see *Scarborough* v. *United States*, 431 U.S. 563, 569 n.8 (1977), this Court should give the same "full effect" to the identical word used in Section 924(c). See *Dickerson*, 460 U.S. at 117 (provisions of simultaneously enacted firearms statute should be treated "*in pari materia* in construing statutory language identical to that at issue here").[2]

---

[2] The majority in *Abreu* dismissed the Court's opinion in *Dickerson* as "not helpful," partly because the statute at issue in *Dickerson* applied to defendants who were "indicted" as well as "convicted," and partly because the result in *Dickerson* was effectively overruled by subsequent amendment of the statute. See *United States* v. *Abreu*, 962 F.2d at 1449 n.3.

Neither reason is sufficient to disregard the broad interpretation given to the term "convicted" by this Court in *Dickerson*. First, the fact that Congress had also imposed disabilities on those under indictment was not essential to the Court's conclusion that Congress meant the term "convicted" to apply to a finding of guilt. Second, while Congress overruled the result in *Dickerson* by providing that the existence of a state conviction is to be determined under state law, see 18 U.S.C. 921(a)(20), that change did not affect *Dickerson*'s conclusion that, when the existence of a conviction turns on federal law, the terms "convicted" and "conviction" are satisfied by the entry of a guilty plea or the return of a jury verdict.

Like the word "conviction," the terms "second" and "subsequent" are not defined by Section 924(c). Those terms must, therefore, "be given their ordinary meaning." *Chapman* v. *United States*, 111 S. Ct. 1919, 1925-1926 (1991); *Moskal* v. *United States*, 111 S. Ct. 461, 468-470 (1990). The term "second" means the "number two in a countable series" or "one that is next after the first in rank, position, or any other serial order." *Webster's Third International Dictionary* 2050 (1986). The term "subsequent" means "following in time * * * or in order of place." *Webster's Third International Dictionary* 2278 (1986). Thus, the phrase "second or subsequent conviction under this subsection" simply refers to any finding of guilt under Section 924(c) other than the first such finding. As the Fourth Circuit explained, "[t]he second conviction is the one that follows the first, either in time or in a number sequence, and the subsequent conviction is any that follows the second, either in time or in number sequence. The enhancement * * * mandated by the statute does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first conviction before the enhancement can apply to the second, or that the defendant have served the sentence on the first." *United States* v. *Raynor*,

939 F.2d at 193. See also *United States* v. *Bennett*, 908 F.2d at 194.

2. The same conclusion is suggested by the need to avoid the anomalous consequences that would result from construing the phrase "second or subsequent conviction" to require a judgment of conviction. See *United States* v. *Brown*, 333 U.S. 18, 26-27 (1948). As we have noted, the statute's reference to a second or subsequent conviction cannot be read in context to refer to a judgment of conviction because no sentence can be imposed upon such a "conviction." In the face of that obstacle, petitioner's argument appears to be that the first conviction (to which the clause implicitly refers) must be embodied in a judgment, but not the second or subsequent conviction on which sentence is yet to be imposed. Petitioner does not explain, nor is it apparent, why the word "conviction" should have a different meaning for each of its referents. Cf. *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (noting the "basic canon of statutory construction that identical terms within an Act bear the same meaning").

Congress could not have intended the applicability of the enhanced sentence provision to turn on whether a separate judgment of conviction has been entered on the first offense. If that were the law, prosecutors could simply charge and try each Section 924(c) offense and its related substantive crime seriatim, thereby ensuring the entry of a judgment of conviction on each succeeding offense before the next violation of Section 924(c) was charged and tried. See *United States* v. *Rawlings*, 821 F.2d at 1546. See also *United States* v. *Raynor*, 939 F.2d at 193; *United States* v. *Nabors*, 901 F.2d at 1358; *United States* v. *Foote*, 898 F.2d at 668. Congress could not

have intended the application of the enhancement provision to turn on the prosecutor's discretionary decision to join offenses in a single indictment. See *United States* v. *Raynor*, 939 F.2d at 193; *United States* v. *Rawlings*, 821 F.2d at 1546.

The Tenth Circuit sought to avoid that result by "requir[ing] that the offense underlying [the second or subsequent] conviction be committed after a defendant has received a judgment of conviction on the prior offense." *United States* v. *Abreu*, 962 F.2d at 1452. The Tenth Circuit, however, found no textual basis for imposing that additional requirement. It relied instead on "the legislative purpose upon which all subsequent-offense statutes are grounded," which the court believed is "to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense" and not "before that penalty has had the chance to have the desired effect on the offender." *Id.* at 1452-1453. We believe the Tenth Circuit erred in characterizing the purpose of Section 924(c) and in construing Section 924(c) in light of that purpose to reach a conclusion contrary to its plain language.

No dictionary definition of the word "conviction" encompasses both the entry of judgment and the completion of the sentence prescribed by that judgment. Thus, the Tenth Circuit's conclusion does not represent a choice from among the various interpretations suggested by the purportedly ambiguous language of Section 924(c). Its conclusion is based solely on that court's assessment of the purpose of Section 924(c)'s enhancement provision. The Tenth Circuit erred, however, in assuming that the only justification for an enhanced sentence for a second offense is the defendant's failure to learn from his previous punish-

ment. As this Court made clear in *Moore* v. *Missouri*, 159 U.S. 673 (1895), the case on which the Tenth Circuit relied, enhanced penalties may be justified on a variety of grounds. A defendant's punishment may be increased "because by his persistence in the perpetration of crime, he had evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence," or simply because "repetition of the offence aggravates guilt." *Moore* v. *Missouri*, 159 U.S. at 677 (quotations omitted). In enacting Section 924(c), Congress was entitled to rely on the commonsense notion, amply demonstrated by the facts of this and similar cases, that violent felonies and narcotics crimes are often committed in sprees, that a powerful deterrent is needed to persuade a culprit not to use a firearm in committing those dangerous felonies, and that one who nonetheless engages in such antisocial conduct requires an extended period of incapacitation. "[T]o construe the statute to require that the defendant complete his sentence on the first [conviction] before becoming subject to the enhancement provisions for the second would immunize the defendant from sentencing enhancement for all firearms offenses committed before the defendant was indicted, tried, convicted and sentenced for the first" and would "result in [the] rewriting [of] the statute, a task not committed to the judiciary." *United States* v. *Raynor*, 939 F.2d at 193-194.

3. Other criminal statutes make clear that when Congress intends to enact a recidivist statute of the type discussed by the Tenth Circuit, it knows how to choose the language necessary to achieve that result. See *Lewis* v. *United States*, 445 U.S. 55, 62 (1980). Thus, the former Dangerous Special Offender statute,

18 U.S.C. 3575(e) (1976), provided enhanced penalties if "the defendant ha[d] previously been convicted * * * for two or more offenses committed on occasions different from one another" *and* if "for one or more of such convictions the defendant ha[d] been imprisoned prior to the commission of [the instant] felony." Congress likewise used explicit language when it chose to require at least a finding of guilt of one offense prior to the commission of a second offense, using the words "prior" or "previous" together with verb tenses that make clear that the second offense must be committed after a finding of guilt on the first. Thus, Congress limited the enhanced penalty provisions of Section 924(e) to a person who "*violates* section 922(g) * * * and *has* three *previous* convictions * * * for a violent felony or a serious drug offense" (emphasis added). Similarly, the Sentencing Reform Act directs the Sentencing Commission to adopt sentencing ranges at or near the statutory maximums for "a defendant [who] * * * *has previously been* convicted of two or more *prior* felonies, each of which is * * * a crime of violence; or [a drug trafficking crime]." 28 U.S.C. 994(h) (emphasis added).[3] The language chosen by

[3] When Congress authorized doubling the available term of imprisonment for persons committing a "second or subsequent" drug trafficking offense under 21 U.S.C. 962, it provided a definition "[f]or purposes of this section" of the phrase "second or subsequent offense" that requires that "prior to the commission of such offense, one or more prior convictions of [the defendant] for a [narcotics] felony * * * have become final." 21 U.S.C. 962(b). Congress could have included the same definitional language in Section 924(c)(1) if it had meant the language there to have the same meaning as in Section 962(b). *United States* v. *Raynor*, 939 F.2d at 194. In fact, Congress's apparent belief that a limiting definition was necessary for purposes of Section 962 indicates its

Congress in Section 924(c) is far broader and embodies a theme of pure deterrence that, contrary to the Tenth Circuit's conclusion, "suggests that the lesson is to be learned, if necessary, all at once." *United States* v. *Bernier*, 954 F.2d at 820.

B. The Legislative History Of Section 924(c) Reflects A Purpose To Impose Enhanced Penalties On Offenders Who Are Found Guilty Of Multiple Violations Under The Statute, Without Regard To The Timing Or Order Of Those Convictions

Because the language of Section 924(c), read in context, answers the question presented by this case, there is no need to consult the legislative history for further guidance as to the statute's meaning. In any event, however, to the extent that it sheds light on the question at all, the legislative history supports the interpretation of the statute adopted by the court below.

Section 924(c) originated as a floor amendment to the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223. Consequently, any further "clues to congressional intent" must be found "in the sparse pāges of floor debate that make up the relevant legislative history." *Busic* v. *United States*, 446 U.S. 398, 404-405 & n.9 (1980). Nothing in that history evinces a congressional intent to limit the enhanced sentence provision of Section 924(c) to offenders who have been convicted of violating Section 924(c) prior to the commission of the instant offense, much less to offenders who have already served their sentence for their first Section 924(c) offense. To the contrary, both the 1968 debates and

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belief that the "second or subsequent" language would not otherwise have that limited meaning.

the debates and reports relating to subsequent amendments suggest that Members of Congress understood the phrase "second or subsequent conviction" to refer simply to the commission of additional offenses that result in convictions.

The House bill (H.R. 17735) and the Senate bill (S. 3633) for what became the Gun Control Act of 1968 each contained various firearms restrictions, but neither imposed special penalties for the use of firearms in the commission of felonies. There was, however, substantial sentiment on the floor of the House for a provision that would both incapacitate offenders who used or carried firearms in the commission of felonies and deter others from doing so through the imposition of harsh penalties. See, *e.g.*, 114 Cong. Rec. 22,230 (1968) (remarks of Rep. Casey); *id.* at 22,231 (Rep. Edmondson); *id.* at 22,233 (Rep. Cramer); *id.* at 22,234 (Rep. Harsha); *id.* at 22,237, 22,245 (Rep. Minshall); *id.* at 22,237 (Rep. Rodgers); *id.* at 22,239-22,240 (Rep. Pucinski); *id.* at 22,242 (Rep. May); *id.* at 22,243 (Rep. Latta); *id.* at 22,243, 22,246 (Rep. Pollock); *id.* at 22,244 (Rep. Randall).

What eventually became Section 924(c) had its genesis in competing floor amendments offered by Representatives Casey and Poff. Representative Casey's amendment provided that criminals who use or carry firearms in the commission of designated state or federal offenses were subject to imprisonment for ten years for a "first offense" and 25 years for a "second or more offense." 114 Cong. Rec. 22,229 (1968). Under Representative Poff's amendment, anyone who used or carried a firearm during the commission of a federal offense was subject to a mandatory minimum one-year sentence, but "[i]n

the case of his second or subsequent conviction" was subject to an enhanced mandatory minimum five-year term of imprisonment. *Id.* at 22,231. The Poff amendment was ultimately adopted by the House (*id.* at 22,248) and a modified version of it became part of the Gun Control Act of 1968. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).[4]

[4] Following passage of a different bill by the Senate, the conference committee accepted in large measure the House version of Section 924(c). However, the conference committee deleted altogether Representative Poff's prohibition on concurrent sentences and made the provision eliminating probation and suspended sentences applicable only to second and subsequent convictions. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The conference committee's version of Section 924(c) was ultimately accepted by the House (114 Cong. Rec. 30,587 (1968)) and the Senate (*id.* at 30,183), and the bill was signed by the President on October 22, 1968. As noted below, Congress has amended Section 924(c) several times since 1968. While some of those amendments changed the penalty ranges applicable to second or subsequent convictions, none altered the "second or subsequent conviction" language itself.

As it was originally enacted, Section 924(c) provided as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

Pub. L. No. 90-618, § 102, 82 Stat. 1223, 1224 (Oct. 22, 1968).

The record of the House debate reveals that the points of contention between Representative Casey and Representative Poff stemmed from Representative Casey's desire to cover the use of firearms during the commission of state felonies, and from Representative Poff's advocacy of somewhat lower but mandatory penalties. See 114 Cong. Rec. 22,229-22,248 (1968). There is no hint in the debates that anyone believed that Representative Poff's reference to "second or subsequent convictions" differed in any significant respect from Representative Casey's reference to "second or more offense[s]." On the contrary, several congressmen, including Representative Poff, used the terms "second conviction" and "second offense" interchangeably. See, *e.g.*, *id.* at 22,231, 22,236 (Rep. Poff); *id.* at 22,234 (Rep. Harsha); *id.* at 22,237 (Rep. Minshall); *id.* at 22,243 (Rep. Pollock) (equating "second conviction" with a "second instance" of using a firearm to commit a felony); *id.* at 22,245 (Rep. Pollock). See also H.R. Conf. Rep. No. 1956, *supra*, at 31-32. Indeed, Representative Poff described his amendment as "retain[ing] [the] central thrust" of the Casey amendment while "strengthen[ing]" it by "provid[ing] that the penalties cannot be suspended and that probation cannot be granted." 114 Cong. Rec. 22,231 (1968).

In addition, the 1968 debates reflect the intention of Section 924(c)'s supporters that its enhanced penalties be invoked whenever an offender uses or carries a firearm for the second time during the commission of a federal offense. As Representative Poff

stated, the purpose of the mandatory penalty provisions contained in his amendment was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time." 114 Cong. Rec. 22,231 (1968). Similarly, citing the need "to take the unlawful and dangerous gunslinger out of circulation," Representative Pollock stated that the enhanced penalty provision would apply to any criminal "who takes a gun and commits a felonious and heinous crime of violence [for] the second time." *Id.* at 22,245. Finally, noting that innocent lives are at risk every time a person commits a crime while using or carrying a firearm, Representative Horton stated that the enhancement provision "singl[es] out repeat offenders" who commit "second or subsequent offenses." *Id.* at 22,247-22,248.

The congressional debates and reports relating to later amendments of Section 924(c) likewise reflect the interchangeable use of the words "offense" and "conviction." See, *e.g.*, 115 Cong. Rec. 34,838-34,840 (1969); H.R. Conf. Rep. No. 1768, 91st Cong., 2d Sess. 20-21 (1970); 116 Cong. Rec. 35,734-35,735 (1970). Thus, for example, during the Senate debates that preceded the 1970 amendment to Section 924(c), Senator Mansfield described as follows the penalties available under the proposed bill:

> The criminal gun user—first and subsequent offenders—would be penalized separately for choosing to carry or use a gun * * *. With regard to the first offender—that is, the man *who for the first time commits a crime using or carrying a gun*—the bill provides that the court be required to sentence the man for from 1 to 10 years * * *. For a second or subsequent offender the mandatory sentence of from 2 to 25 years is provided in its fullest sense. * * * [T]his bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in commiting a crime under Federal law. *If that choice is made more than once*, the offender can in no way avoid a prison sentence regardless of the circumstances.

115 Cong. Rec. 34,838 (1969) (emphasis added). See also H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986).

The 1988 amendment to Section 924(c) is particularly worthy of note. Among other changes, that amendment increased from 10 to 20 years the penalty that must be imposed in the event of a "second or subsequent conviction." That increase in the available punishment postdated the Eleventh Circuit's decision in *Rawlings*, *supra*, which was then the only published decision by any court of appeals construing the "second or subsequent" language in Section 924(c). Not only do the floor statements relating to the amendment continue the practice of using the words "conviction" and "offense" interchangeably, *e.g.*, 134 Cong. Rec. S14,071 (daily ed. Oct. 3, 1988); *id.* at S17,365 (daily ed. Nov. 10, 1988), but they reflect no intention to change the interpretation announced by *Rawlings*. In light of the settled principle that "Congress normally can be presumed to have had knowledge of the interpretation given" to sections of an old law incorporated into a new enactment, *Lorillard* v. *Pons*, 434 U.S 575, 581 (1978); see also *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987)

(Congress is "presumed to act" with full awareness of established judicial interpretations), Congress's failure to express any disagreement with that interpretation is particularly damaging to petitioner's claim here. It is unlikely that Congress decided that it was imperative to increase the punishments available for repeat offenders without troubling to investigate how those punishments were being meted out.

In sum, both the legislative debates on the amendment that became Section 924(c) and the floor statements and reports relating to the amendments effected in later years fail to support—indeed, they generally contradict—petitioner's view that the enhancement provision should come into play only when the defendant commits an offense after the entry of a judgment of conviction and the service of his sentence thereunder.

C. The Rule Of Lenity Casts No Doubt On The Court Of Appeals' Conclusion In This Case

The essence of petitioner's submission is his invocation of the rule of lenity. He bases his reliance on the rule of lenity primarily on the purported ambiguity that flows from the fact that the terms used by Congress have several different dictionary definitions. Petitioner also contends that the rule of lenity should be invoked because "a 105-year sentence of imprisonment, upon [his] first appearance in court for any violation of [S]ection 924(c), is so glaringly unjust that the Court cannot but question whether Congress intended such an application." Pet. Br. 24. We submit that petitioner misconceives the circumstances that call for application of the rule of lenity.

This Court has emphasized repeatedly that the rule of lenity is not applicable unless there is a " 'grievous ambiguity or uncertainty in the language and structure of the Act,' *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even after a court has 'seize[d] every thing from which aid can be derived' it is still 'left with an ambiguous statute.' " *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991), quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). See also, *e.g.*, *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 849 (1991); *Moskal* v. *United States*, 111 S. Ct. at 465; *Russello* v. *United States*, 464 U.S. 16, 29 (1983).

The rule of lenity does not apply here. A statute is not " 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a more narrow construction than that urged by the Government," *Moskal* v. *United States*, 111 S. Ct. at 465 (emphasis in original), or because there is a division of judicial authority over the proper construction. If that were sufficient, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Ibid.* See also *Chapman* v. *United States*, 111 S. Ct. at 1929; *United States* v. *Rodgers*, 466 U.S. 475 (1984). This Court has "always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended

scope even *after* resort to" the standard tools of statutory interpretation. *Moskal* v. *United States*, 111 S. Ct. at 465 (emphasis in original); *Chapman* v. *United States*, 111 S. Ct. at 1929. As explained above, and as eight courts of appeals have held, the text of the statute directs that the enhanced sentence be imposed for each violation after the first, and the legislative history does not undermine that conclusion in any way. Thus, petitioner cannot establish the requisite ambiguity simply by pointing to the existence of multiple dictionary definitions of the terms used by Congress, without reference to the context in which those terms are used and the anomalous consequences that would result from subscribing to the alternatives.

Petitioner is also mistaken in believing that the length of his sentence calls for application of the rule of lenity. That sentence, while concededly severe, is hardly disproportionate to petitioner's violent crime spree, during which he committed six bank robberies at gun point. Petitioner's series of bank robberies constituted serious crimes so fraught with danger that Congress has long authorized a penalty of 25 years' imprisonment for each of them, quite apart from the provisions of Section 924(c). See 18 U.S.C. 2113(d). That petitioner was able to evade law enforcement and commit numerous felonies in the interim does not render his total sentence "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932)), as to raise a "reasonable doubt" about Congress's intent. *Moskal* v. *United States*, 111 S. Ct. at 465. Under these circumstances, there is no occasion to resort to the rule of lenity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October Term, 1992

THOMAS LEE DEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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ARGUMENT

I. IF, AS ARGUED BY THE GOVERNMENT, CONGRESS CHOSE OR IS PRESUMED TO HAVE CHOSEN ITS WORDS CAREFULLY, THE COURT SHOULD FIND IN FAVOR OF THE PETITIONER, BECAUSE CONGRESS CAREFULLY CHOSE "SECOND OR SUBSEQUENT CONVICTION" RATHER THAN "SECOND OR SUBSEQUENT OFFENSE."

A. The Government's Argument Presumes That Congress Carefully Chose the Language of Section 924(c).

As noted in the Petitioner's opening brief, 18 U.S.C. § 924(c) was offered as an amendment on the House floor by Representative Poff, and the amendment passed on the same day it was offered. *See* Br. Pet. 15; *see also Busic v. United States*, 446 U.S. 398, 405 (1980); *Simpson v. United States*, 435 U.S. 6, 13 (1978). Because of "the haste in this legislation," there was "considerable confusion as to the meaning of words." 114 Cong. Rec. 22,243 (1968) (statement of Rep. Hunt, supporting the Casey amendment).

In its brief, the Government nonetheless argues that "when Congress intends to enact a recidivist statute . . . it knows how to choose the language necessary to achieve that result." Br. Resp. 16. Reviewing other recidivist statutes, the Government concludes that the "language *chosen* by Congress in Section 924(c) is far broader" than that found in the other statutes. Br. Resp. 17-18 (emphasis added). The argument thus eschews the possibility that Congress was inartful in its draftsmanship and embraces the proposition that Congress carefully chose the language of section 924(c).

B. If Congress Carefully Chose "Second or Subsequent Conviction," the Court Should Rule in Favor of the Petitioner.

If, as the Government argues, Congress chose or is presumed to have chosen carefully the language of Section 924(c), then the language reflects that Congress made a careful distinction between the imposition of the five-year enhancement and the imposition of the twenty-year enhancement. For the language of the statute expressly requires the imposition of a consecutive five-year sentence upon a person who *"uses or carries a firearm"* during any crime of violence, but calls for the imposition of the twenty-year enhancement only *"[i]n the case of his second or subsequent conviction."* 18 U.S.C. § 924(c) (emphasis added). The Government further argues that the Court should ignore this difference in language (presumably carefully drafted) and that it should change the latter phrase to read, "whenever an offender uses or carries a firearm for the second time" during a crime of violence. Resp. Br. 21.

To the Government's argument, "'[t]he short answer is that Congress did not write the statute that way.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In fact, with regard to the twenty-year enhancement, Congress specifically excluded

the phrase "subsequent *offense*" and in its stead substituted the phrase "second or subsequent *conviction*." *See* H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The Court, therefore, should refrain from concluding here that the five-year and the twenty-year enhancement clauses have the same meaning. *Russello*, 464 U.S. at 23; *see also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (stating that exclusion of language by the Conference Committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

In sum, if the Court agrees with the principles underlying the Government's argument and the attendant principles of statutory construction, the Court should find in favor of the Petitioner because Congress chose "second or subsequent conviction" and rejected "second or subsequent offense."

II. EVEN WHEN CONGRESS HAS CHOSEN TO USE THE WORDS "SECOND OR SUBSEQUENT OFFENSE," IT HAS REQUIRED A PRIOR CONVICTION AS A PREREQUISITE TO THE IMPOSITION OF AN ENHANCED SENTENCE.

A. The Government Argues That "Second or Subsequent Conviction" Means "Second or Subsequent Offense."

The Government also argues that "Members of Congress understood the phrase 'second or subsequent conviction' to refer simply to the commission of additional offenses that result in convictions," Br. Resp. 19, and that they "used the terms 'second conviction' and 'second

offense' interchangeably." Br. Resp. 21. Thus, the Government would have the Court conclude that "second or subsequent conviction" must mean "second or subsequent offense."[1]

B. Congress Expressly Has Stated That an Enhancement for a Second or Subsequent Offense Requires a Prior Conviction.

Even if the Court rewrites the statute in this manner, it does not advance the Government's argument. As noted in the Petitioner's opening brief, an examination of related federal statutes, if relevant, supports the conclusion "that section 924(c)'s twenty-year enhancement was intended to apply to an offender who has a prior conviction under that section." Br. Pet. 20. Specifically, when Congress legislated an enhanced sentence for a drug offender for "the offender's second or subsequent offense," it expressly stated that "a person shall be considered convicted of a second or subsequent offense, if, prior to the commission of such offenses, one or more prior convictions of him for a [narcotics] felony . . . have become final." 21 U.S.C. § 962(b).[2]

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[1] The premise of this argument is that Congress simply was inartful in debating about and drafting the language of section 924(c). The argument thus is inconsistent with the Government's other argument that Congress chose or is presumed to have chosen carefully the language of the statute. *See supra* text, at 2.

[2] The Government argues that the prerequisite of a prior conviction for the application of the twenty-year enhancement would lead a prosecutor to "simply charge and try each Section 924(c) offense and its related substantive crime seriatim, thereby ensuring the entry of a judgment of conviction on each succeeding offense before the next violation of Section 924(c) was charged and tried." Br. Resp. 14. The Government offers no evidence that this has occurred with regard to other related recidivist statutes, such as 21 U.S.C. § 962(b), and no explanation for why this even might occur if section 924(c) is construed and applied in the same manner as the related statutes are applied.

Thus, even when Congress expressly has used the term "second or subsequent offense," it has required a *prior* conviction as a prerequisite for the imposition of an enhanced sentence. The "related federal statute[ ] fortif[ies] [the] conclusion," *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983), that a prior conviction is a prerequisite to the imposition of section 924(c)'s twenty-year enhancement.

Insofar as Members of Congress tend to use interchangeably "second conviction" and "second offense," as argued by the Government, Br. Resp. 22-23, the related narcotics statute clarifies any attendant ambiguity in favor of the Petitioner. Even if the related statute did not clarify the ambiguity, however, in construing statutes this Court has been extremely wary of relying on the statements of individual legislators (much less their choices of vocabulary) made during floor debates. *See S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972). The Court also repeatedly has refused to rely on postenactment statements by individual legislators and has stated that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 119 (1988); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447

U.S. 102, 117 (1980); *see also Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). Thus, even if Congress had not precisely defined "second or subsequent offense" to include a prior conviction, the Government's reliance on the contemporaneous and subsequent statements of individual legislators would be unpersuasive to establish that "second or subsequent conviction" means "second or subsequent offense."

III. THERE IS NO ANOMALY IN THE PETITIONER'S CONSTRUCTION OF "SECOND OR SUBSEQUENT CONVICTION."

A. The Government Finds Petitioner's Construction to Be an Anomaly Because the Government Ignores Part of the Clause in Question.

The Petitioner argued in his opening brief that "second or subsequent conviction" means "an additional judgment of conviction entered later in time." *See* Br. Pet. 23-24. In its brief, the Government finds the argument to be an anomaly because "a judgment reflects not only the verdict but also the sentence" and when a judgment has been entered, "the defendant has already been sentenced." Br. Resp. 11. The entire statutory phrase at issue is: "*In the case of his* second or subsequent conviction." 18 U.S.C. § 924(c) (emphasis added). There is no anomaly in the Petitioner's construction of "second or subsequent conviction," and the appearance of one only arises when the words "second or subsequent conviction" are considered apart from the preceding phrase, "in the case of his."

B. The Petitioner's Construction Gives Effect to Every Word of the Clause of the Statute and Is Not Anomalous.

Any interpretation of a statute must give "'effect, if possible, to every clause and word of [the] statute.'" *Moskal v. United States*, 111 S. Ct. 461, 466 (1990) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). As noted in the Petitioner's opening brief, Representative Poff apparently "conceived of each prosecution as involving only one underlying felony and one firearm offense," and "this conception . . . supports the construction of 'in the case of his' as meaning 'in the legal case of'." Br. Pet. 18 n.13. There is no anomaly in the position that Congress intended for the twenty-year enhancement to be imposed *in the legal case* of (*i.e.*, the legal proceeding concerning) an additional judgment of conviction. The Petitioner's construction of the statute, therefore, does not require that a court impose sentence after entry of judgment. It does give effect, however, to every clause and word of the statute. *Moskal*, 111 S. Ct. at 466.

IV. THE HOLDING OF *DICKERSON*, IF APPLICABLE, SUPPORTS THE PETITIONER'S, NOT THE GOVERNMENT'S, POSITION.

A. The Government Misreads *Dickerson* to Hold That "Conviction" Merely Means a "Finding of Guilt."

The Government asks the Court to broadly construe "conviction" as used in the phrase "[i]n the case of his second or subsequent conviction," 18 U.S.C. § 924(c), and thus to hold that it means "a finding of guilt." Br. Resp.

11-12. In support of this position, the Government relies on *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which is purported to have held that a defendant was "convicted," for purposes of 18 U.S.C. § 922(g)(1) and (h)(1), "once his guilty plea was noted by the state court." Br. Resp. 11. Because the facts and holding of *Dickerson* cannot be construed as broadly as the Government argues, *Dickerson*, if applicable, support's the Petitioner's, not the Government's, position in this case.

B. The Court Held in *Dickerson* That "Conviction" Means a "Finding of Guilt Plus a Sentence."

The issue in *Dickerson* was "whether firearms disabilities imposed by 18 U.S.C. §§ 922(g) and (h) . . . apply with respect to a person who pleads guilty to a state offense punishable by imprisonment for more than one year, *when the record of the proceeding subsequently is expunged under state procedure following a successful term of probation.*" *Dickerson*, 460 U.S. at 105 (emphasis added). Sections 922(g) and 922(h) proscribed "any person 'who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year'" from shipping, transporting, or receiving any firearm or ammunition in interstate commerce. *Id.* (footnote omitted).

Briefly, the facts before the Court were the following. Mr. David F. Kennison, the director, chairman of the board, and a shareholder of New Banner Institute, Inc., had entered a plea of guilty to the state offense of carrying a concealed weapon. *Id.* at 106-07. The state court had entered an order noting the guilty plea, deferring entry of

a formal judgment, and placing Mr. Kennison on probation. *Id.* at 107-08. When Mr. Kennison completed the term of probation, the state court's record of the deferred judgment was expunged pursuant to state law. *Id.* The Treasury Department's Bureau of Alcohol, Tobacco, and Firearms later issued a dealer's license to New Banner, but sought to revoke the license after it learned of Mr. Kennison's expunged record. *Id.* at 108-09.

Contrary to the Government's argument in this case, therefore, the issue, the facts, and the holding of *Dickerson* did not involve merely "a finding of guilt" or merely a "guilty plea . . . noted by the state court." Br. Resp. 11. *Dickerson did* involve (1) the entry of a guilty plea, (2) the service of a term of punishment, and (3) the subsequent expungement of the deferred judgment procedure. In its opinion, moreover, this Court recognized the absence of the "*usual* entry of a formal judgment," but it emphasized the presence of (a) the charge . . . , (b) the plea of guilty to that charge, and (c) the court's placing Mr. Kennison upon probation." *Dickerson*, 460 U.S. at 111 (emphasis added). Based upon these facts, the Court held: "Thus, for purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, *followed by a sentence of probation*, with being 'convicted' within the language of §§ 922(g) and (h)." *Id.* at 114 (emphasis added).

The holding of *Dickerson* expressly embraces the principle that an indicia of finality, by entry of judgment or imposition and service of a sentence, is a defining characteristic of a "conviction." *Dickerson*, therefore, supports the Petitioner's, not the Government's, position that "conviction" means more than a finding of guilt and

includes at least the entry of judgment or imposition and service of sentence.

C. The Applicability of *Dickerson* Is Questionable

The applicability of *Dickerson* to this case is questionable for two reasons, however. First, in *Dickerson*, this Court stressed that the statutory provisions in question applied not only to persons convicted but also to persons indicted, and it found "the inclusion of the indicted status to be indicative of congressional intent that the term 'convicted' be construed broadly." *United States v. Abreu*, 962 F.2d 1447, 1449 n.3 (10th Cir. 1992) (en banc) (citing and distinguishing *Dickerson*, 460 U.S. at 115-16), *petition for cert. filed*, 51 Crim. L. Rep. (BNA) 3120 (U.S. July 9, 1992) (No. 92-67). The Court also relied on a similar, overlapping gun control statute, noting that nothing on the face of that statute suggested a congressional intent to limit its coverage. *Dickerson*, 460 U.S. at 111.

In the present case, section 924(c) has no broad provision concerning persons indicted that is comparable to the provision considered in *Dickerson*. *See Abreu*, 963 F.2d at 1449 n.3. In addition, unlike the provisions at issue in *Dickerson*, the face of section 924(c) does suggest a congressional intent to limit the coverage of the twenty-year enhancement. As shown in Section I, *supra*, although Congress chose to impose a five-year enhancement upon a person who uses or carries a firearm during a violent felony, it declined to impose the twenty-year enhancement upon a person who "uses or carries a firearm for the second time" or who "commits a second or subsequent

offense." *See supra* text, at 2-3. Instead, Congress specifically limited the language of the twenty-year enhancement to the case of a second or subsequent *conviction*.

Second, "Congress has effectively overruled *Dickerson* in the Firearms Owners' Protection Act . . . , which expressly adopts the state's definition of conviction." *Abreu*, 962 F.2d at 1449 n.3 (citation omitted). The Government argues that this action of Congress does "affect *Dickerson's* conclusion that, when the existence of a conviction turns on federal law, the terms 'convicted' and 'conviction' are satisfied by the entry of a guilty plea or the return of a jury verdict." Br. Resp. 13 n.2. As discussed previously, however, this is not the holding of *Dickerson*. *See supra* text, at 10-11.

For these reasons, the facts and holding of *Dickerson*, if applicable to this case, support the Petitioner's, not the Government's, position.

V. THE PRESUMPTION THAT, WHEN CONGRESS AMENDED SECTION 924(c) IN 1988, IT AGREED WITH *RAWLINGS* SIMPLY BECAUSE IT FAILED TO EXPRESS ITS DISAGREEMENT, IS UNWARRANTED.

A. The Government Argues That Congress' Failure to Disagree with *Rawlings* in 1988 Means That It Agreed with *Rawlings*.

The Government notes that, in 1988, Congress amended section 924(c) and "increased from 10 to 20 years the penalty that must be imposed in the event of a 'second or subsequent conviction.'" Br. Resp. 23. The Government also notes that this "increase in the available

punishment postdated the Eleventh Circuit's decision in [*United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987)], which was then the only published decision by any court of appeals construing the 'second or subsequent' language in Section 924(c)." Br. Resp. 23. On this basis, the Government argues that "Congress's failure to express any disagreement with that interpretation is particularly damaging to petitioner's claim here," Br. Resp. 24, because Congress normally can be presumed to know the interpretation given to an old law incorporated into a new enactment. Br. Resp. 23 (citing *Rodriguez v. United States*, 480 U.S. 522, 525 (1987), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)).

B. If Congress Adopted *Rawlings*, It Also Adopted Applications of Section 924(c) That Are Inconsistent with *Rawlings*.

The Government's reliance on the presumption, generally known in judicial and regulatory contexts as the re-enactment doctrine, *see, e.g., Peoples Federal Savings and Loan Ass'n v. Commissioner*, 948 F.2d 289, 300 (6th Cir. 1991), is unjustified in this case. First, although *Rawlings* was the only court of appeals case that addressed directly the meaning of "second or subsequent" at the time of the 1988 amendment, at least one other court of appeals had published an opinion affirming two consecutive five-year sentences for two violations of section 924(c) charged in one indictment. *See United States v. Fontanilla*, 849 F.2d 1257, 1257-58 (9th Cir. 1988); *see also United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987) (Government objected in district court only on the ground that the five-year sentences were concurrent), *cert. denied*, 488 U.S. 983

(1988). In *Fontanilla*, moreover, the Government did not cross-appeal the two consecutive five-year sentences. *See Fontanilla*, 849 F.2d at 1257-58. Thus, at best it can be presumed that, in enacting the 1988 amendment, Congress knew about the inconsistent application of section 924(c) across the circuits and knew that the Government had no uniform enforcement policy concerning the meaning of "second or subsequent conviction."[3]

C. Because Congress Is Presumed to Know Only the Well-Established Interpretation, the Presumption Is Unwarranted in This Case.

Second, the re-enactment doctrine as articulated by this Court does not mean that Congress, when amending a portion of a statute, adopts any and all case law that is extant concerning any part of the statute. The doctrine presumes only that Congress acted with full awareness of "the *well-established* judicial interpretation of the law." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (emphasis added); *see also Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions. . . .").

When the Court has employed the doctrine, moreover, it nonetheless has reviewed the legislative history of the statute in question to ensure that Congress in fact had

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[3] In fact, as late as 1991, the Government did not cross-appeal consecutive five-year sentences for multiple violations of section 924(c) that were charged in one indictment. *See United States v. Luskin*, 926 F.2d 372, 374 n.2 (4th Cir.), *cert. denied*, 112 S. Ct. 68 (1991).

knowledge of the well-established judicial interpretations of the law. *See, e.g., Rodriguez*, 480 U.S. at 525; *Lorillard*, 434 U.S. at 480-83. As recognized by the Sixth Circuit Court of Appeals in its extensive review of this Court's use of the re-enactment doctrine in the regulatory context, this Court has used the doctrine as an "interpretive tool," but has based its decisions "primarily on its ability to read the clear record of legislative intent concerning the precise issue in the case." *Peoples Federal Savings and Loan Ass'n*, 948 F.2d at 301.

If there is no indication that Congress has considered the well-established judicial interpretation or the pre-existing regulation, the re-enactment doctrine is useless as an interpretive tool:

> The re-enactment doctrine is merely an interpretative tool fashioned by the courts for their own use in construing ambiguous legislation. It is most useful in situations where there is some indication that Congress noted or considered the regulations in effect at the time of its action. Otherwise, the doctrine may be as doubtful as the silence of the statutes and legislative history to which it is applied.

Id. at 302-03 (footnote omitted). As stated by Judge Learned Hand, " '[t]o suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears . . . unwarranted.' " *Id.* at 303 n.8 (quoting *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976 (2d Cir.), *cert. denied*, 302 U.S. 768 (1937)).

In the present case, the opinion in *Rawlings* was not the "well-established judicial interpretation" of "second

or subsequent conviction" when Congress amended section 924(c) in 1988. If the interpretation of the statute by one circuit even can be counted as "established," then the implementation of the statute and the practice of the Government in a different circuit is at least as established. *See Fontanilla*, 849 F.2d at 1257-58.

More importantly, however, the legislative history of the 1988 amendment does not mention *Rawlings* or expressly indicate that Congress acted "with full awareness" of the opinion. *See Rodriguez*, 480 U.S. at 525. In these circumstances, it is far from "overwhelmingly clear," *id.*, that Congress intended to adopt *Rawlings* by virtue of its amendment only of the term of imprisonment, and the application of the re-enactment doctrine, thus, is particularly inappropriate in this case. *Cf. Lorillard*, 434 U.S. at 581. In short, the silence of Congress in 1988 with regard to *Rawlings* is "as doubtful as the silence of the statute[ ] and legislative history to which it is applied." *Peoples Federal Savings and Loan Ass'n*, 948 F.2d at 302-03 (footnote omitted).

CONCLUSION

For the foregoing additional reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

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